

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

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In Re:) Case No. 19-30088
) Chapter 11
PG&E CORPORATION AND PACIFIC)
GAS AND ELECTRIC COMPANY,) San Francisco, California
) Wednesday, December 11, 2019
Debtor.) 10:00 AM

ORAL ARGUMENT ON POST-
PETITION INTEREST ON
UNSECURED CLAIMS

STATUS CONFERENCE REGARDING
SCHEDULING OF THE CONTINUED
HEARING ON MOTION OF DEBTORS
FOR ENTRY OF ORDERS (I)
APPROVING TERMS OF, AND
DEBTORS' ENTRY INTO AND
PERFORMANCE UNDER, EXIT
FINANCING COMMITMENT LETTERS
AND (II) AUTHORIZING
INCURRENCE, PAYMENT, AND
ALLOWANCE OF FEE AND/OR
PREMIUMS, INDEMNITIES, COSTS
AND EXPENSES AS
ADMINISTRATIVE EXPENSE
CLAIMS, FILED BY DEBTOR PG&E
CORPORATION [4446]

TRANSCRIPT OF PROCEEDINGS
BEFORE HONORABLE DENNIS MONTALI
UNITED STATES BANKRUPTCY JUDGE

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PG&E Corp., Pacific Gas & Electric Co.

SAN FRANCISCO, CALIFORNIA, WEDNESDAY, DECEMBER 11, 2019,

10:00 AM

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(Call to order of the Court.)

THE CLERK: All rise. Court is now in session, the Honorable Dennis Montali presiding.

THE COURT: Good morning.

IN UNISON: Good morning, Your Honor.

THE COURT: Please be seated.

THE CLERK: Matter of PG&E Corporation.

THE COURT: Mr. Tsekerides, you're in the first chair today.

MR. TSEKERIDES: Yes, I am.

THE COURT: So my sources tell me you and your colleagues have been a little busy lately. Right?

MR. TSEKERIDES: That's correct.

THE COURT: I've got a couple of housekeeping chores. We have -- wait a minute; see if this is working. This microphone's about to fall apart.

On the docket, we have the status conference on the exit-financing motion. Has that been resolved? Mr. Karotkin? It's -- all we're doing is picking a date, I believe.

MR. KAROTKIN: Stephen Karotkin, Weil, Gotshal & Manges, for the debtors.

Yes, I think we've resolved it. And if we could move

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1 it, Your Honor, to the 14th of January?

2 THE COURT: Sure.

3 MR. KAROTKIN: And then we've spoken with the Milbank
4 firm and we'll know a little more details next week. And if it
5 needs to be moved further, we'll be in contact with --

6 THE COURT: Right. Well, I realize --

7 MR. KAROTKIN: -- your chambers.

8 THE COURT: -- there're a log of things --

9 MR. KAROTKIN: Yes.

10 THE COURT: -- lot of balls in the air right now. So,
11 okay. So we'll put it then, and I'll just -- we won't worry
12 about anything else for now.

13 MR. KAROTKIN: Okay.

14 THE COURT: And on -- stay up here, because on that
15 same subject, this morning, as -- if you don't know -- some of
16 your co-counsel know -- I saw a stipulation between the debtor
17 and the three parties to the disputed interest, the liquidated-
18 versus-unliquidated question. And you've taken that off
19 calendar.

20 So here's my question: Originally your -- maybe it
21 was your office or your local counsel; I forget. Someone asked
22 that -- or had set the hearing on the TCC RSA for next week at
23 10, and my only reservation at the time was because it looked
24 like we were already jammed up for other matters, and
25 particularly that latter motion. But then when I heard that

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1 Judge -- the district court --

2 MR. KAROTKIN: Donato.

3 THE COURT: Judge Donato, yes. -- Judge Donato's
4 hearing was going to be at 1, I put ours over to 2. But now in
5 view of the -- in view of the continuance of the liquidated-
6 claim issue, would you like me to go back to 10 o'clock so we
7 don't have a situation where the lawyers up in Judge Donato's
8 court can't tell him what the bankruptcy court did with the
9 motion?

10 MR. KAROTKIN: That'd be fine. As you know, we
11 noticed it for 2 o'clock already.

12 THE COURT: Well, we can do it electronically. I
13 mean, I --

14 MR. KAROTKIN: We're happy to do that. I mean, we --

15 THE COURT: Well, the question is whether it makes
16 sense.

17 MR. KAROTKIN: I think it does.

18 THE COURT: It seems to me it makes sense. If it
19 turns out there's a battle and we have hours and hours,
20 somebody'll have to -- we'll have to send Mr. Orsini up to the
21 nineteenth floor to offer up his body to get more time. But on
22 the --

23 MR. KAROTKIN: I don't think anyone would accept that
24 body.

25 (Laughter.)

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1 THE COURT: But if -- yeah. But if the -- but if the
2 RSA motion is resolved, it might be easier for everybody --

3 MR. KAROTKIN: Yes.

4 THE COURT: -- doing that.

5 MR. KAROTKIN: We agree. So --

6 THE COURT: Okay.

7 MR. KAROTKIN: -- we're happy to do that, and we're
8 happy to take whatever --

9 THE COURT: We --

10 MR. KAROTKIN: -- action we can, to get notice out as
11 quickly as we can.

12 THE COURT: Ms. Parada will put a docket entry on the
13 docket that will move the time from 10 o'clock -- 2 o'clock
14 back to 10 o'clock.

15 MR. KAROTKIN: Very well.

16 THE COURT: Right, Ms. Parada?

17 THE CLERK: Yes.

18 THE COURT: That's all you really need to do.

19 And that will automatically give --

20 MR. KAROTKIN: Okay.

21 THE COURT: -- everybody on the ECF list --

22 MR. KAROTKIN: Notice.

23 THE COURT: -- notice. And we'll just see what
24 happens.

25 MR. KAROTKIN: Okay. And then we will not commit to

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1 do anything in addition to that.

2 THE COURT: And also, the docket will reflect that the
3 exit motion is simply continued to January 14th, and nothing
4 else about that for now. And I assumed that that was what
5 we're going to do. Okay.

6 MR. KAROTKIN: Very well. Thank you, sir.

7 THE COURT: Great. Thank you very much.

8 Okay, Mr. Tsekerides, on the post-petition-interest
9 question, have you and others worked out a time allocation?

10 MR. TSEKERIDES: We have, Your Honor.

11 THE COURT: Which? Okay.

12 MR. TSEKERIDES: Ted Tsekerides from Weil Gotshal, for
13 the debtors.

14 I'm going to take fifteen minutes on the affirmative
15 and the -- Mr. Johnston for the equity holders is going to
16 reserve five, and then we're going to reserve the balance for
17 the rebuttal.

18 THE COURT: Okay. All right, one second.

19 (Court and clerk confer.)

20 THE COURT: Okay, well, I've -- I presume everybody
21 took a look at what I sent out, so you're up.

22 MR. TSEKERIDES: We did. Well, Your Honor, it's not
23 often that a bankruptcy court grappling with an issue has a
24 circuit-court decision directly on point, but --

25 THE COURT: Oh, come on.

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1 MR. TSEKERIDES: -- that's --

2 THE COURT: Happens all the time. And I just --

3 MR. TSEKERIDES: No. Almost never.

4 THE COURT: Come on. I got reversed by the United
5 States Supreme Court because I followed a Ninth Circuit
6 decision. 9 --

7 MR. TSEKERIDES: Hopefully this doesn't go that far.

8 THE COURT: 9-0, I got reversed in Travelers. You
9 know? I didn't take it personally, though.

10 MR. TSEKERIDES: Well, here I think everyone agrees
11 that post-petition interest should be paid. And the question
12 is at what rate. And as you saw from our papers, Cardelucci,
13 in the Ninth Circuit almost twenty years ago, resolved that
14 issue, and it said that the rate -- post-petition interest in a
15 solvent-debtor case is the federal judgment rate. And it's
16 really not more complicated than that.

17 And I think because the other side has no answer for
18 Cardelucci, basically their argument boils down to, just forget
19 about it, Judge; forget about Cardelucci, ignore it. They
20 claim it has no bearing on the issue, which was somewhat
21 puzzling. But this Court can't forget about Cardelucci.

22 THE COURT: Well, I could distinguish it, I guess,
23 right?

24 MR. TSEKERIDES: Well, I don't know. You could try.
25 But I'm going to tell you why you can't. There's nothing, in

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1 almost twenty years, in this circuit that says Cardelucci
2 should be limited in any way, that it doesn't apply across the
3 board. I think your words in the order were "one size fits
4 all". Their words (sic) was "uniformly". And I think the
5 reason why they did that was to avoid the hodgepodge of
6 different rates. You have a state rate, a contract rate that
7 could be below the federal judgment rate.

8 THE COURT: Which --

9 MR. TSEKERIDES: Again, I think you pointed out --

10 THE COURT: Which we have here.

11 MR. TSEKERIDES: We do. And --

12 THE COURT: I tried to check the federal rate this
13 morning. Do you know what it is today?

14 MR. TSEKERIDES: I don't.

15 THE COURT: I --

16 MR. TSEKERIDES: 2.59, in that area?

17 THE COURT: I didn't get there, but it obviously moves
18 every month a little bit, I think. Might have gone up. Might
19 have gone down.

20 MR. TSEKERIDES: But I think that's why -- I mean, if
21 you look at -- if you look at Cardelucci -- and I'm going to
22 quote a few times today. But it said squarely, this appeal
23 presents the narrow but important issue of whether such post-
24 petition interest is to be calculated using the federal
25 judgment interest rate or is determined by the parties'

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1 contract or state law.

2 We conclude that 11 U.S. Code Section 726(a) (5)
3 mandates application of the federal interest rate. No
4 equivocation nowhere in that case; only for impaired, not
5 impaired. And I'll get to that, because I know that was one of
6 your questions.

7 THE COURT: Well, it's one of their questions. I
8 mean, I --

9 MR. TSEKERIDES: But --

10 THE COURT: -- I didn't make it up. But it's their --

11 MR. TSEKERIDES: Well, but you asked us --

12 THE COURT: They're looking for an out.

13 MR. TSEKERIDES: Right, and you asked us to address
14 it. They don't have an out, Your Honor.

15 THE COURT: Right.

16 MR. TSEKERIDES: And I think, again, if you read the
17 decision, which I know you have, that what the court was
18 getting at is we need uniformity, we can't have a situation
19 where we're looking at potentially fifteen, twenty different
20 types of rates. And I think, at the end of the day, it
21 considered whatever equities there might be. And I think it's
22 important, because one of the things you might hear: well,
23 it's a solvent debtor, that should change everything. But the
24 court spoke to that, and it said, even if there is a windfall,
25 even if there is a windfall, we still have to apply this,

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1 because we can't shift -- and I'm quoting, "cannot shift
2 depending on the interests invoked by the specific factual
3 circumstances before the court".

4 THE COURT: Well, but there's also some circularity
5 there, because if it weren't a solvent debtor, the question
6 wouldn't have been -- it wouldn't have been asked. Right?

7 MR. TSEKERIDES: Well, but in this circuit --

8 THE COURT: The creditor in Cardelucci was paid in
9 full. It was -- I went back and read the Cardelucci lower
10 court, and it was a -- I don't know if you're familiar with it;
11 it was a knock-down-drag-out just between a man and his wife,
12 who had a --

13 MR. TSEKERIDES: It was.

14 THE COURT: -- business dispute with the debtor. And
15 they litigated forever.

16 MR. TSEKERIDES: They did.

17 THE COURT: But the point, Mr. -- a creditor, Mr.
18 Onink, I believe it was, he said, they're solvent, I should
19 be -- I should get my judgment rate.

20 MR. TSEKERIDES: Right, but -- and the Ninth Circuit
21 said no.

22 THE COURT: Right.

23 MR. TSEKERIDES: The Ninth Circuit said solvency
24 doesn't change -- solvency means you get post-petition
25 interest. If they weren't solvent, they'd get no interest.

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1 THE COURT: Well, that was the point that struck me
2 is, strange, the other side says, well, the judge -- the court
3 was wrong by looking to Section 7 -- Chapter 7. Well, fine,
4 take it out, and then you're out of luck.

5 MR. TSEKERIDES: Then you get nothing.

6 THE COURT: Right.

7 MR. TSEKERIDES: So the Ninth Circuit's already done
8 whatever balancing needed to be done and determined, using the
9 Code provision -- and again, our plan uses the Code, and I
10 think it's important when we get to the impairment, but I'll
11 preview it in a second. The plan is not changing anything.
12 The plan is providing what we think the Ninth Circuit and the
13 Code mandate. So if we're giving them what they're entitled to
14 under the Code and the law in this circuit, they cannot, by
15 definition, be impaired.

16 And I think it's important. Cardelucci wasn't sort of
17 pulled out of a hat and never happened before. They relied on
18 some lower -- some BAP decisions --

19 THE COURT: Well, the BAP case.

20 MR. TSEKERIDES: But also, one thing I did over the
21 weekend -- they cited a Shoen case for some proposition that
22 we're wrong. But it's interesting; in Shoen, the court used
23 contract rate, but for a very particular reason. It was a
24 stock purchase, and the court ordered essentially that someone
25 had to buy stock. But there's a footnote in Shoen, relating to

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1 the lower-court decision that the Ninth Circuit adopted. And
2 I'm going to quote it because I think it's important here. The
3 court there said, "As we discuss later in this Memorandum, the
4 bankruptcy court could reasonably have concluded that the
5 debtors were all solvent as a result of AMERCO's
6 indemnification obligation. If the debtors were solvent, then
7 (even if the bankruptcy court were to be held to have erred in
8 concluding that there was a judicially-mandated sale of stock,
9 or if the debts were to be found to be dischargeable) interest
10 would accrue at the federal judgment interest rate pursuant to
11 11 U.S.C. 726(a)(5)." Cardelucci didn't make it up out of thin
12 air. So even in Shoen the Ninth Circuit, adopting that BAP
13 decision, recognized: solvent debtor, federal judgment rate.

14 THE COURT: Well, the BAP and the Ninth Circuit
15 started with a statute, and the statute says "the legal
16 rate" --

17 MR. TSEKERIDES: Correct.

18 THE COURT: -- the words "legal rate".

19 MR. TSEKERIDES: I agree.

20 THE COURT: So the question is what's the legal rate.
21 That's the whole question.

22 MR. TSEKERIDES: And Cardelucci says the legal rate is
23 the federal judgment rate.

24 So -- I mean, I was --

25 THE COURT: But do you think -- but what do you think

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1 might have been the case if the Ninth Circuit focused on the
2 question that it's a Chapter 11? Which of course it was, and
3 this one is. So why -- what's the point of invoking Chapter 7
4 in a Chapter 11?

5 MR. TSEKERIDES: Well, I think Cardelucci was looking
6 for why would a solvent debtor be able to get interest. What
7 Code provision talks about interest? 726(a)(5). The Ninth
8 Circuit's decided that, even in a Chapter 11 case, they can
9 rely on 726(a)(5), in a solvent-debtor case, to provide
10 interest where there normally would be no interest.

11 THE COURT: But doesn't that implicate the best-
12 interest test, and that's the outcome? So that a plan will
13 fail if it's not as favorable as the best-interest outcome in
14 7. So, for example, if in Cardelucci the plan offered no
15 interest or one percent or whatever, something lower than Fed.,
16 then I would think that the court would have said that's not
17 good enough, because the best-interest test is implicated.

18 MR. TSEKERIDES: Well, I think the court would have
19 said that's not good enough, because the Code provided for
20 post-petition interest in the solvent-debtor case. And so --
21 like our plan here. Let --

22 THE COURT: Well, no, no, but I'm giving you that too.
23 I'm saying we're going back in time and you're the lawyer --

24 MR. TSEKERIDES: Okay.

25 THE COURT: -- for Cardelucci and you say, "Look, Mr.

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1 Cardelucci, we got to" -- "we got to come up with a way" -- "we
2 got to avoid this federal judgment" -- I mean, "this state-
3 court judgment of Tan (ph.)" or whatever it was, "so let's put
4 one percent in the plan." And I would think the objection
5 would be, if we now analyze it as a Chapter 7, there would be
6 at least the federal judgment rate --

7 MR. TSEKERIDES: If we -- yes, if we --

8 THE COURT: -- which is more than one -- might not
9 have been, but it --

10 MR. TSEKERIDES: Whatever it was at the time.

11 THE COURT: Let's assume it was. So that would be --
12 therefore, your plan would be flawed if it didn't at least
13 match the federal judgment rate.

14 MR. TSEKERIDES: Right. And here too, I think. If
15 our plan said we're not going to pay them any post-petition
16 interest, we would be impairing them. Our plan would not work,
17 because Cardelucci says, no, you got to pay them post-petition
18 interest in a solvent-debtor case. And that's exactly what
19 we're doing.

20 THE COURT: So what are my choices? Seriously. I
21 mean --

22 MR. TSEKERIDES: Yeah.

23 THE COURT: -- I am bound by it. And I was reversed,
24 I know, because I had no choice; I had to follow the Ninth
25 Circuit law on that subject. Do I have an option here?

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1 MR. TSEKERIDES: You have no option. You have to
2 apply the federal judgment rate, Your Honor.

3 THE COURT: Well, do I have an option of saying the --
4 you know, pink-Cadillac defense; that was a pink Cadillac, this
5 is a blue Cadillac? I mean, is it different because in
6 Cardelucci the creditor was impaired? I actually went back and
7 looked at the original plan, and clearly Mr. Onink was
8 impaired.

9 MR. TSEKERIDES: Onink, yeah.

10 THE COURT: Here, that's not the case.

11 MR. TSEKERIDES: We're putting the cart before the
12 horse and, frankly, I think we're flipping things. You can
13 only determine impairment if the plan doesn't provide what
14 you're entitled to. The Ninth Circuit has said
15 unequivocally -- the last twenty years, not one Ninth Circuit
16 decision has gone the other way -- that says it's federal
17 judgment rate.

18 So we're not even talking about impairment until we
19 figure out, well, what is the plan doing? Okay, the plan's
20 giving them exactly what the Ninth Circuit says. There can't
21 be impairment. You don't start with impairment first and then
22 decide what they're entitled to. Impairment doesn't tell you
23 what you're entitled to. The law tells you what you're
24 entitled to. And --

25 THE COURT: Well, but if you want to -- excuse me. If

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1 you want to --

2 MR. TSEKERIDES: Yeah.

3 THE COURT: -- if you want to take away their vote,
4 you just leave them unimpaired.

5 MR. TSEKERIDES: But they are unimpaired. We're
6 paying them in full --

7 THE COURT: But that takes away their vote.

8 MR. TSEKERIDES: Well, I understand that but, I
9 mean -- well, we're paying them in full, so creditors who get
10 paid in full don't get to vote. So here the question is what
11 are they entitled to, and Cardelucci says what they're entitled
12 to.

13 THE COURT: Are you going to answer my other question
14 about --

15 MR. TSEKERIDES: I am.

16 THE COURT: -- the post-gap? And I mean --

17 MR. TSEKERIDES: Well, I was --

18 THE COURT: -- I use the term -- the term -- I didn't
19 make it up. Some other court has used that notion of that word
20 "gap". You know what we're talking about here.

21 MR. TSEKERIDES: Well, just to be clear, because I was
22 a little confused by it, but I want to make sure we're on the
23 same page; the gap you're talking about is the post-petition
24 through the effective date --

25 THE COURT: Well, that's your --

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1 MR. TSEKERIDES: Right.

2 THE COURT: You didn't -- in your papers, you didn't
3 use the word "gap", but you bracketed the time frame.

4 MR. TSEKERIDES: I agree.

5 THE COURT: Okay.

6 MR. TSEKERIDES: And I just want to make sure we're on
7 the same page.

8 THE COURT: Yeah.

9 MR. TSEKERIDES: When you're saying "beyond gap",
10 you're talking about post-effective date, right?

11 THE COURT: Well, that's what's going to happen to one
12 of the classes.

13 MR. TSEKERIDES: Well, I'm not so sure. And I think
14 that's why there might have been some misunderstanding.

15 THE COURT: Okay.

16 MR. TSEKERIDES: So again, this only comes into play
17 if we lose. If you agree with me there is no post-gap period,
18 they're going to be paid on the effective date --

19 THE COURT: Well, no, I'm not -- I want to make
20 sure --

21 MR. TSEKERIDES: Yeah.

22 THE COURT: -- we're clear on that.

23 MR. TSEKERIDES: Yeah.

24 THE COURT: Look, in a Chapter 7 there is -- nobody
25 cares about what happens after there's been a distribution. So

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1 if you had a -- if you had a solvent Chapter 7, 726 would work.

2 MR. TSEKERIDES: Okay.

3 THE COURT: The trustee would pay the creditors, pay
4 the statutory rate of interest, and give what's left over to
5 the debtor. Right? And --

6 MR. TSEKERIDES: Yes.

7 THE COURT: And if it were a corporate debtor that
8 was -- I mean a human-being debtor in Chapter 7 and he or she
9 would go on about his business and, if there were
10 nondischargeable debts or tax debts, that interest rate would
11 apply under nonbankruptcy law.

12 So, to me, what I'm saying is that the analysis in
13 Chapter 7 stops at some point when there's nothing more to
14 distribute in the 7. But in a Chapter 11, there is this
15 question of, well, what about claims that survive and exist
16 after the effective date of the plan.

17 MR. TSEKERIDES: And my point is, Your Honor, I don't
18 believe that any of these claims in the classes that are
19 identified will be surviving after the effective date. They
20 all will be paid on the effective date. The language --

21 THE COURT: Well, then I -- excuse me. Then I misread
22 something in your brief.

23 MR. TSEKERIDES: Okay.

24 THE COURT: What does 3B -- how does 3 --

25 MR. TSEKERIDES: Are you talking about the language

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1 that said, if we -- if the Court were to find a different
2 rate --

3 THE COURT: No.

4 MR. TSEKERIDES: -- would apply, then --

5 THE COURT: No. I'll tell you when I'm --

6 MR. TSEKERIDES: Okay.

7 THE COURT: -- going to -- so I have the -- I'm
8 looking at your opening brief, which is --

9 MR. TSEKERIDES: Okay.

10 THE COURT: -- Doc. 4624. And in that -- on the very
11 first page, which -- right after the preliminary statement, and
12 it's -- and so for footer purposes, it's page 6 of 14.

13 MR. TSEKERIDES: I have it.

14 THE COURT: On line 8 it says creditors "are to
15 receive payment in full of their claims in cash, plus interest
16 from the commencement of these Chapter 11 Cases through the
17 effective date of the Debtors' Plan, at the Federal Judgment
18 Rate."

19 MR. TSEKERIDES: Right.

20 THE COURT: And then later we end up with three of the
21 classes being paid on the effective date, and the fourth one --
22 it's still out there, out in space somewhere; 3B.

23 MR. TSEKERIDES: Well, no, the fourth one would still
24 be paid on the effective date. I think what might have caused
25 the confusion -- it might have only been with the 3B, which is

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1 the utility-funded --

2 THE COURT: Yeah.

3 MR. TSEKERIDES: -- debt claims that are going to be
4 the subject --

5 THE COURT: Yes.

6 MR. TSEKERIDES: -- of the make-whole. Well, we had
7 some language that said, if the Court finds a different rate,
8 then we would be applying a different rate. That might have
9 caused the confusion. But --

10 THE COURT: Well, what I read from that is --

11 MR. TSEKERIDES: Yeah.

12 THE COURT: -- if I buy the creditors' argument, then
13 you've got to go back and take out the federal rate and put in
14 something. Now, for one group of creditors, they're going to
15 get less.

16 MR. TSEKERIDES: Right.

17 THE COURT: For some, they're going to get a lot more.
18 And for some, they're going to get in between. And I realize
19 there's a lot of money at stake here, but it's the analysis.

20 And so what you're telling me -- and I want to make
21 sure this is clear. And we're going to see a new plan from the
22 debtor tomorrow, I guess. So that plan will say that 3A, 3B,
23 4A, 4B, are all getting paid in full on the effective date.

24 MR. TSEKERIDES: Correct.

25 THE COURT: Well, that's not --

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1 MR. TSEKERIDES: It should.

2 THE COURT: -- what I read earlier, because I thought
3 3B passed through. Okay. Nonissue.

4 MR. TSEKERIDES: Nonissue.

5 THE COURT: I mean, because the gap -- but think about
6 it. In --

7 MR. TSEKERIDES: I agree.

8 THE COURT: In the world of an ongoing 11, there are
9 three temporal periods of time --

10 MR. TSEKERIDES: Um-hum.

11 THE COURT: -- pre-petition, what I call gap --

12 MR. TSEKERIDES: What -- called the gap.

13 THE COURT: -- but, as I say, I recall a BAP decision
14 of a few years ago that talked about it; and then there's the
15 post --

16 MR. TSEKERIDES: Um-hum.

17 THE COURT: -- effective date, when you're out back in
18 the real world --

19 MR. TSEKERIDES: I mean, it should be academic here.
20 I mean, I --

21 THE COURT: Yeah. Okay.

22 MR. TSEKERIDES: I don't need to get into -- I mean, I
23 have a theory of what would happen, but I don't need to go
24 there.

25 THE COURT: No, we don't have to. You've clarified

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1 it. And if the creditors' counsel believe that that's not
2 true, they can tell me. But I read it as though it passed
3 through; thus, that's why I put the question the way I did.
4 Okay.

5 MR. TSEKERIDES: I mean, the other question that I
6 think you asked here says both sides need to explain why it
7 matters whether a class is impaired or unimpaired. My response
8 to that is it doesn't matter for determining what rate of post-
9 petition interest they're entitled to. It might matter if we
10 gave them the wrong rate. If you decided that it should be a
11 different rate and our plan has a rate other than what you
12 think it should be, then --

13 THE COURT: Well --

14 MR. TSEKERIDES: -- we have an impairment.

15 THE COURT: -- I don't think there's any dispute about
16 what is the applicable rate, because it's whatever -- the
17 petition-date rate is what it is. I mean, if the company filed
18 bankruptcy today rather than January 29th, we'd go to the
19 Federal Reserve website and say, what's the federal judgment
20 rate on December 11th, and that's what we'd find. And that's
21 what federal courts do all the time when they issue federal
22 civil judgments: they plug in whatever the rate is.

23 MR. TSEKERIDES: I agree.

24 THE COURT: And so I assume that, if I reject your
25 theory and believe that somehow Cardelucci is not applicable --

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1 I'm not sure what you do, but I assume, for most of them, it'll
2 be whatever their contract rate is. And for some, I don't
3 know, it'll be state law.

4 MR. TSEKERIDES: I mean, it would depend on how you
5 approached it. But, I mean, one --- if you completely ignored
6 our arguments in Cardelucci, then presumably you'd say, the
7 contracts, or ten-percent it, or California Code section, or,
8 if somebody had a contract that even had a lower rate, that
9 rate, and then --

10 THE COURT: But that's my point. Your classification
11 says that there are some people that have a lower rate. So
12 they're --

13 MR. TSEKERIDES: There are.

14 THE COURT: -- they're going to be losers by
15 winning --

16 MR. TSEKERIDES: Exactly.

17 THE COURT: -- today.

18 MR. TSEKERIDES: And I think that's why, again, going
19 back to Cardelucci, I said, look, uniform "one size fits all",
20 this is the rate, solvent debtor, post-petition interest,
21 because it makes the most sense --

22 THE COURT: No, but what I'm -- I'm saying something
23 differently (sic). If I disagree with you and say Cardelucci
24 doesn't apply, therefore the plan cannot plug in the federal
25 rate from Jan. 29, I don't pick a number, because they're all

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1 over the lot; they're -- it'll be no "one size fits all" --

2 MR. TSEKERIDES: Right. Well, you don't pick --

3 THE COURT: -- because it could be zero, ten, seven.

4 MR. TSEKERIDES: You don't pick a number but,
5 respectfully, hopefully you'll give us direction that would
6 say, for those who have a contract, do this and, for those who
7 don't --

8 THE COURT: Yeah.

9 MR. TSEKERIDES: -- do that.

10 THE COURT: Well, I would think that's --

11 MR. TSEKERIDES: Yeah.

12 THE COURT: -- that's what I would have to do and I'll
13 do.

14 MR. TSEKERIDES: Yeah. So those are our arguments.
15 And I don't think that -- any arguments we heard from the other
16 side, again, basically, forget about Cardelucci is their point.
17 And relying on 1124 and 1129 sort of missed the point about
18 whether -- none of those sections tell us what rate they're
19 entitled to.

20 THE COURT: Well, my point about -- in my tentative,
21 or whatever you want to call it --

22 MR. TSEKERIDES: Um-hum.

23 THE COURT: -- wasn't quite a tentative, but it might
24 have been like a tentative -- the -- I don't think we even get
25 to 1129 --

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1 MR. TSEKERIDES: Right.

2 THE COURT: -- if they're unimpaired.

3 MR. TSEKERIDES: If they're unimpaired --

4 THE COURT: Unimpaired, because if you're unimpaired,
5 1129 isn't available to you.

6 MR. TSEKERIDES: Correct.

7 THE COURT: You can object to confirmation under some
8 other theory, but you can't say, "I'm not being treated fairly
9 and equitably," because by statute you are being treated --
10 you're unimpaired.

11 MR. TSEKERIDES: Right. So --

12 THE COURT: Well, you didn't say anything about Ultra,
13 but it seemed to me that the principle --

14 MR. TSEKERIDES: Well --

15 THE COURT: -- from Ultra is, as I tried to say, blame
16 it on the plan, don't blame -- I mean blame it on --

17 MR. TSEKERIDES: On the Code.

18 THE COURT: -- Congress --

19 MR. TSEKERIDES: Yeah.

20 THE COURT: -- don't blame it on the drafter of the
21 plan. And it might sound callous and unforgiving, but it is
22 the law. And if the interest rates change and suddenly a lot
23 of these contracts were below the federal interest rate, we'd
24 have everybody on the other side of the table here.

25 MR. TSEKERIDES: And I think, on Ultra, Your Honor, I

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1 mean, you saw from the letter briefing -- to the extent it was
2 even appropriate. But at the end of the day, whatever the
3 Fifth Circuit did in its new decision, the principle that we
4 cited it for stayed exactly the same, which is basically, if
5 it's the Code -- and I know I'm beating a dead horse here but,
6 if it's the Code that is, quote, "impairing" you, you're not
7 impaired.

8 THE COURT: Well, I was thinking about the -- I mean,
9 of course the interesting tone of the author of Ultra II and
10 Ultra I. But I was also thinking about the bankruptcy judge in
11 that case, who I happen to know. And he got reversed and he
12 got remanded, and one of his instructions on remand is, figure
13 out the right interest rate.

14 MR. TSEKERIDES: Well, they don't have Cardelucci.

15 THE COURT: I don't have that task.

16 MR. TSEKERIDES: You don't have that problem.

17 THE COURT: Right. I mean, I guess that's --

18 MR. TSEKERIDES: You've got the --

19 THE COURT: I mean, that seems to be the case. In
20 other words, if I were to blame it on Congress, they've already
21 answered the question. So the judge in Texas doesn't have that
22 option; he's got to figure it out. But --

23 MR. TSEKERIDES: Yeah, well, he can be guided by
24 Cardelucci, too.

25 THE COURT: They don't like the Ninth Circuit --

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1 MR. TSEKERIDES: Yeah.

2 THE COURT: -- in Texas.

3 (Laughter.)

4 THE COURT: We have to straighten them out
5 periodically, but --

6 MR. TSEKERIDES: Unless Your Honor has any questions
7 for me, I think that's --

8 THE COURT: No questions.

9 MR. TSEKERIDES: -- that's it for -- thank you.

10 THE COURT: Mr. Johnston?

11 MR. JOHNSTON: Good morning, Your Honor. Jim Johnston
12 of Jones Day, on behalf of certain PG&E shareholders.

13 Your Honor, the unsecured creditors say that
14 Cardelucci is narrow and applies only in cases involving the
15 best-interest test. Think Mr. Tsekerides did a good job
16 explaining why that's wrong.

17 I understand what happened with Fobian (ph.) and
18 Travelers, but you did what you had to do in that case; you
19 followed binding Ninth Circuit precedent. And the Supreme
20 Court didn't criticize you for it. I think that was --

21 THE COURT: Hey, they reversed me 9-0.

22 MR. JOHNSTON: I prefer to think of it as them
23 reviewing the -- reversing the Ninth Circuit 9-0.

24 THE COURT: Said well. Yeah, I like to think of it,
25 too.

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1 MR. JOHNSTON: This morning I wanted to take a moment
2 to reflect on why Cardelucci says what it says, and I want to
3 start by looking at the truly bizarre alternative universe
4 proposed by the creditors. What they're saying to you is that
5 the Bankruptcy Code requires you to apply three different rules
6 of decision, three completely different analyses, to determine
7 the rate of post-petition interest on an unsecured claim
8 against a solvent Chapter 11 debtor. They would have you apply
9 a different analysis to identical unsecured claims, depending
10 solely on the happenstance of whether a particular claim was in
11 an unimpaired class, as to which they say Section 1124 applies
12 the rule of decision, an impaired consenting class, as to which
13 they say Section 1129(a)(7) provides the rule of decision, or
14 an impaired dissenting class, as to which they say Section
15 1129(b) provides the rule of decision. Same claim, three
16 different rules. That, I submit, is suspect right off the bat.

17 And of course you can search high and low in
18 Cardelucci for three different rules, and you won't find them.
19 In fact, you won't see any mention of the best-interest test,
20 any distinction between impaired and unimpaired classes, or any
21 citation to Sections 1124 --

22 THE COURT: Well, I believe, historically, Cardelucci
23 and the creditor stipulated around all that, and we had a
24 confirmed plan and they reserved that narrow issue; right? I
25 mean, maybe you didn't go back into it, but I did, and that's

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1 what happened. That was this -- it took four tries at the
2 plan, but it got confirmed because the various objections were
3 withdrawn, and they just reserved the --

4 MR. JOHNSTON: Yeah --

5 THE COURT: -- interest issue.

6 MR. JOHNSTON: -- the issue was reserved for the Ninth
7 Circuit.

8 THE COURT: Yeah. Right.

9 MR. JOHNSTON: And in --

10 THE COURT: Well, it was reserved for the trial court,
11 and then obviously it -- there's a long -- when you think about
12 it, the Cardelucci bankruptcy started in 1993, and the circuit
13 didn't deal with it until 2002. So they duked it out for a
14 long time.

15 MR. JOHNSTON: That's a lot of post-petition interest,
16 too.

17 THE COURT: Yeah.

18 MR. JOHNSTON: Faced with that stipulation, though,
19 the Ninth Circuit didn't say, okay, here's the analysis that
20 applies to an impaired dissenting class, or here's the analysis
21 that applies to an unimpaired class.

22 THE COURT: But I'm trying to say they didn't have to,
23 because it was never teed up to them, because Mr. Onink never
24 ever was told that he's in an unimpaired class.

25 MR. JOHNSTON: I think they did have to, because what

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1 the Ninth Circuit did was write broadly and unequivocally. And
2 the creditors basically described that as sloppy; right? They
3 say that the Ninth Circuit couldn't have meant what it wrote;
4 it wrote so broadly. But the Ninth Circuit's not dumb. Chief
5 Judge Schroeder isn't dumb. Judge McKeown, Judge Zilly,
6 they're not dumb.

7 THE COURT: Judge Zilly is a --

8 MR. JOHNSTON: And --

9 THE COURT: -- district judge, actually, and he's a
10 district judge --

11 MR. JOHNSTON: I know that.

12 THE COURT: -- in Seattle and has had some bankruptcy
13 experience. I knew him in practice as a bankruptcy lawyer.

14 MR. JOHNSTON: He was sitting by designation --

15 THE COURT: Right.

16 MR. JOHNSTON: -- and he wrote the opinion.

17 THE COURT: Right.

18 MR. JOHNSTON: And as the creditors acknowledge in the
19 reply briefs, as you said this morning, those judges knew about
20 the best-interest test, they knew about Section 726(a)(5) and
21 how it works its way into Chapter 11. It was in the briefing
22 to them. But despite that, the panel wrote as broadly and
23 unequivocally and with as much purpose as possible, and it
24 didn't, not once, hint that the decision was limited to --

25 THE COURT: But seriously --

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1 MR. JOHNSTON: -- the best-interest test.

2 THE COURT: -- if Judge Zilly decided to go off on a
3 toot and write the definitive law-review article and said,
4 "Let's talk about impaired/unimpaired," somebody might have
5 said, "Oh, that's not our job here." His only question to
6 decide for the panel was what is the right rate of interest,
7 not whether there're different rules for impaired versus
8 unimpaired, because he never had the -- it wasn't presented. I
9 mean, courts aren't supposed to write law-review articles;
10 they're supposed to write -- resolve decision --

11 MR. JOHNSTON: No, there --

12 THE COURT: -- or disputes.

13 MR. JOHNSTON: -- there certainly -- you certainly
14 would have expected a treatise on impaired and unimpaired, or
15 the --

16 THE COURT: Well, some of my --

17 MR. JOHNSTON: -- best-interest test.

18 THE COURT: -- brothers and sisters like to write that
19 way.

20 MR. JOHNSTON: But --

21 THE COURT: I would never admit to doing that.

22 MR. JOHNSTON: -- I submit that, if the rule was as
23 limited as the creditors say it was, you would have expected at
24 least a sentence that would say so. And so --

25 THE COURT: No, but again, I don't want to beat this

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1 to death but, if Mr. Onink's lawyer started arguing that his
2 clients should be treated as unimpaired, Judge Zilly might have
3 said, "But he wasn't unimpaired."

4 MR. JOHNSTON: Correct.

5 THE COURT: "End of story. What are you arguing?" I
6 mean, it would be a frivolous argument, it seems to me, for a
7 lawyer to argue that his client is treated in a manner that
8 isn't the way he was treated.

9 MR. JOHNSTON: No, there would have been no point of
10 arguing that.

11 THE COURT: Right. Right.

12 MR. JOHNSTON: My point is in the explication of the
13 rule of the decision.

14 THE COURT: Okay.

15 MR. JOHNSTON: And so let me approach it a different
16 way. You might ask, well, why; why didn't the panel narrow its
17 decision to the best-interest test. And I think you can find
18 that in the opinion, where Judge Zilly told us, fully -- the
19 last third of the opinion explains why a uniform application of
20 the federal judgment rate makes good sense. The court didn't
21 want a piecemeal ad hoc result like what the creditors are
22 asking for here, so it laid down a rule applicable to all
23 solvent Chapter 11 debtors, and it did it for three separate
24 reasons: First and foremost, as Your Honor noted in the
25 tentative, is the equitable treatment of creditors, which is

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1 fostered by a single uniform rate across the board. The court
2 also held that a uniform rate is the most judicially efficient
3 and practical manner of allocating remaining assets, and it
4 promotes uniformity within federal law.

5 THE COURT: Yeah, but what if somebody -- a bug -- a
6 little -- somebody whispered in Judge Zilly's ear and said,
7 "The shareholders are going to get a half-a-billion-dollar
8 windfall"? What do I do about that?

9 MR. JOHNSTON: He told us that in the opinion.

10 THE COURT: Well, he said "windfalls". There --

11 MR. JOHNSTON: Right.

12 THE COURT: There could be windfalls.

13 MR. JOHNSTON: And he said --

14 THE COURT: He didn't say he didn't know it was a half
15 a billion dollars.

16 MR. JOHNSTON: It's --

17 THE COURT: And it wasn't in this -- that case.

18 MR. JOHNSTON: It's all relative, Your Honor. I
19 mean --

20 THE COURT: Right.

21 MR. JOHNSTON: -- the creditors were looking for a
22 similar amount in contract rate post -- rate of interest over
23 federal judgment --

24 THE COURT: Right.

25 MR. JOHNSTON: -- rate of interest. And so I submit

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1 that consideration was taken into account and outweighed or
2 rejected.

3 And so you think about what -- the mishmash proposed
4 by the creditors here, with the different rules and different
5 rates applicable to really the very same or similar claims, and
6 it runs just directly counter to all three of the
7 considerations set forth in Cardelucci. Those -- the rule or
8 rules, plural, proposed by the creditors fostered disparity,
9 not uniformity, they resulted in unequal treatment among
10 similarly situated creditors, and they create a truly
11 administrative nightmare.

12 You'll hear about how strange it is that the Ninth
13 Circuit took a Chapter 7 provision and made it broadly
14 applicable to Chapter 11. But it's not strange at all that the
15 Ninth Circuit looked to Section 726(a)(5) in this context.
16 Section 726(a)(5) is the only provision in the entire
17 Bankruptcy Code that addresses --

18 THE COURT: Right.

19 MR. JOHNSTON: -- the subject of post-petition
20 interest.

21 THE COURT: Well, that was my point: what if we just
22 say, "Okay, we won't consider it"? Then what?

23 MR. JOHNSTON: Then as you noted, Section 502(b)(2)
24 says --

25 THE COURT: It's the culprit.

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1 MR. JOHNSTON: -- no post-petition once no interest.

2 THE COURT: Then it's the culprit, right?

3 MR. JOHNSTON: Right.

4 THE COURT: Okay.

5 MR. JOHNSTON: So 726(a)(5), being the only provision
6 that addresses the subject, is the logical source for a rule of
7 decision for what could be characterized really as a gap in the
8 statute, for how to deal with unsecured claims against a
9 solvent Chapter 11 debtor. Ninth Circuit looked to that
10 statute to develop the rule it laid down. It makes perfect
11 sense.

12 So I'll leave you with that. I did want to address
13 two cleanup issues, before I sit down, that came up in your
14 discourse with Mr. Tsekerides. First, the federal judgment
15 rate is determined as of the petition date.

16 THE COURT: No, I know that.

17 MR. JOHNSTON: Okay, you --

18 THE COURT: But they adjust it every month, I believe.
19 Don't they?

20 MR. JOHNSTON: They adjust -- it's adjusted --

21 THE COURT: So as you'll see --

22 MR. JOHNSTON: -- every month --

23 THE COURT: So if the company filed -- if the debtor
24 filed today --

25 MR. JOHNSTON: Correct.

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1 THE COURT: -- we would look to see what the December
2 rule (sic) is. It wouldn't be later in the year. It's in
3 effect, right, today, per the Federal Reserve Board; right?

4 MR. JOHNSTON: Correct.

5 THE COURT: Okay.

6 MR. JOHNSTON: It changes over time but, for
7 purposes --

8 THE COURT: Yeah.

9 MR. JOHNSTON: -- of a bankruptcy case, you look to
10 the rate that was in effect on the petition date.

11 THE COURT: No, I know that.

12 MR. JOHNSTON: And then in terms of the Class 3B
13 issue, I think the confusion lies in the provision, of the
14 plan, that says that the treatment of Class 3B will change if
15 you determine that a rate other than the federal judgment rate
16 applies.

17 THE COURT: Well --

18 MR. JOHNSTON: And --

19 THE COURT: Yes, that's true, and that's what Mr.
20 Tsekerides said, but somehow I read that it gets treated a
21 different way, going forward. But he's resolved it. I mean --

22 MR. JOHNSTON: Okay.

23 THE COURT: -- to me, all four classes are either in
24 or out of the federal judgment rate here. And if I choose and
25 take the view of the creditors, then I'll leave for another day

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1 what you do with it or what the proponents do with it. Okay.

2 MR. JOHNSTON: Okay.

3 THE COURT: You and Mr. Tsekerides have plenty of time
4 to reserve.

5 MR. JOHNSTON: Great. Thank you, Your Honor.

6 THE COURT: Okay. Mr. Dunne, are you the --

7 MR. DUNNE: I don't know what the right adjective is.

8 THE COURT: The duty guy?

9 MR. DUNNE: But yes, I am.

10 THE COURT: The victim here?

11 MR. DUNNE: Yes --

12 THE COURT: Okay.

13 MR. DUNNE: -- Your Honor. I'll --

14 THE COURT: And are you sharing the time with anyone
15 else?

16 MR. DUNNE: I'm going to take up about twenty minutes.
17 I'd like to reserve five, if possible, for rebuttal, and then
18 there'll be --

19 THE COURT: Well, you don't get a rebuttal. The
20 question is are you sharing the time with other counsel.

21 MR. DUNNE: Well, I raise one point on the rebuttal,
22 only because I was recently in the circuit court where, if you
23 reserve more than a third of your time as opening, you can't do
24 that -- reserve more than a third for rebuttal.

25 THE COURT: Well, but I'm -- this is a trial court,

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1 and I --

2 MR. DUNNE: I understand. I'm asking for five
3 minutes. Asking for five minutes. I'm just saying --

4 THE COURT: I just want to know if any -- if you're
5 sharing with any of the other --

6 MR. DUNNE: Yes.

7 THE COURT: -- counsel.

8 MR. DUNNE: Akin will go next after me, and then
9 there's another counsel thereafter.

10 THE COURT: Just give me who and time estimates.

11 MR. DUNNE: Five for Akin, and for Gibson Dunn --

12 THE COURT: For whom? Oh.

13 UNIDENTIFIED SPEAKER: Fifteen minutes, Your Honor.

14 THE COURT: Okay. Thanks.

15 All right. So, Mr. Dunne, your time is starting.

16 I've got a question for you, on a Post-It. No, I thought about
17 what you probably were thinking about, and that is that, well,
18 what about -- look at this situation as in Sylmar and, I
19 believe, the case in -- maybe it wasn't Ultra, but in PPI, is
20 what about a lease termination. So -- but in lease
21 termination, by definition, you have a breach.

22 502(a)(4) -- there's no one in this room who would
23 ever act as an attorney and seek fees that were in excess of
24 reasonable. But if a lawyer filed -- if a creditor of this
25 debtor filed a claim for fees for services and sought an

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1 unreasonable amount, would that lawyer get his unreasonable --
2 or her unreasonable fees if unimpaired under 1124, or would
3 502(a)(4) trump whatever implication that 1124 would have? It
4 seems to me I know the answer. What do you think is the
5 answer?

6 MR. DUNNE: Well, I think that you would be able to
7 knock those fees down to whatever the Court deemed to be
8 reasonable --

9 THE COURT: Right.

10 MR. DUNNE: -- but you're going to do it under the
11 contract and applicable law --

12 THE COURT: But what if the --

13 MR. DUNNE: -- with respect to --

14 THE COURT: -- what if the plan -- by the way, I
15 forgot to tell you; this lawyer also is representing a creditor
16 who files a creditors plan. And the creditors plan says, my
17 attorneys' fees are unimpaired under 1124.

18 MR. DUNNE: You're going to say that --

19 THE COURT: So then --

20 MR. DUNNE: You're going to say that -- well, that is
21 easy.

22 THE COURT: Right.

23 MR. DUNNE: That's easy. That's not imposed in good
24 faith, Your Honor, because that --

25 THE COURT: Well, but what I'm getting at is the

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1 lawyer says, "Well, I'm entitled to a jillion dollars of fees,
2 and that's because I'm allowed under nonbankruptcy law." It
3 would seem to me the bankruptcy court and Code, 502(a)(4), will
4 say, no, that doesn't get you anywhere, because 502(a)(4)
5 overrides whatever leaves you in 1124 as unimpaired. You're
6 still affected by the Code, which is what Ultra says. It
7 doesn't say 502(a)(4), but it's the concept.

8 MR. DUNNE: Well, let me jump right into statutory
9 impairment, Your Honor, because that --

10 THE COURT: Okay.

11 MR. DUNNE: -- that is a big issue here, because I do
12 think -- and I'll start with the statutory canon for you, which
13 is -- and we have a couple of cites for it, which is that a
14 court shouldn't interpret -- it should be loath to interpret a
15 statute in a way that effectuates an outcome that Congress had
16 previously amended the statute to avoid.

17 So let me go back to statutory impairment. And I'll
18 give you a cite there. It's Eastern District, California,
19 Spence v. Mendoza, 993 F.Supp. 785. And the reason I'm
20 bringing that up is that Congress knew how to legislate
21 statutory impairment. If we go back to the way the Code
22 existed in 1978, 1124 in three subclauses --

23 THE COURT: Yeah. I know.

24 MR. DUNNE: -- (1), (2), and (3).

25 THE COURT: Um-hum.

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1 MR. DUNNE: (3) said you get paid -- a creditor gets
2 paid in cash the allowed amount of its claim. They used the
3 word "allowed amount" --

4 THE COURT: Right.

5 MR. DUNNE: -- because what does "allowed" do? It
6 sends us, unsurprisingly, to Section 502, whose heading is
7 "Allowance of claims and (sic) interests". With respect to
8 1124(1), they did not use the word "allowed claim". They used
9 "claim"; you get all your legal, contractual, equitable rights
10 associated with the claim.

11 So now we know a couple things: Congress knew how to
12 make a distinction between "allowed claim" and "claim".
13 "Allowed claim" is statutory impairment. And when that was
14 used to basically disenfranchise a creditor and to not pay them
15 post-petition interest as their contract required, Congress
16 acted immediately, within the same calendar year, to abrogate
17 that --

18 THE COURT: Well, and everybody knows -- we know it
19 was the New Horizon (sic) case, and that's what was --

20 MR. DUNNE: The New Valley case, yes. And --

21 THE COURT: -- that triggered it. Or New Valley.
22 Excuse me.

23 MR. DUNNE: And so Your Honor should be very -- when
24 the tentative ruling and the question said, well, maybe you get
25 no interest rate, that's exactly what New Valley said, is you

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1 get nothing, because it's not the plan doing it, it's the
2 allowed claim under 502.

3 THE COURT: But what if the -- what if the contract
4 doesn't provide for any interest?

5 MR. DUNNE: But then that's -- Your Honor, I said that
6 before, meaning -- let me just deal with the one point. To the
7 extent you have a contract rate and it's lower than FJR, you
8 get the contract rate, under our view of the law. We have a
9 principal position. We're not looking to say winners or losers
10 here, Your Honor. And if you don't, then you could go to see
11 what the outcome would have been under applicable state law.
12 Maybe that's the federal judgment rate. Maybe it's the state
13 judgment rate.

14 THE COURT: Well, I don't know how state law could be
15 federal rate, but -- okay, but --

16 MR. DUNNE: Well, and that -- I'm not principally --

17 THE COURT: I mean --

18 MR. DUNNE: -- focused on it. Gibson will address
19 that.

20 THE COURT: But it seems to me that if we look at the
21 mass of -- the universe of unsecured creditors who are impacted
22 and are your constituents generally, most of them are above the
23 interest rate and federal rate. And so they're -- maybe
24 they're here for a matter of principal, but they're also here
25 for a matter of --

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1 MR. DUNNE: I'm here for principal. I don't have
2 anybody else, Your Honor.

3 THE COURT: They're here for a matter of money.

4 MR. DUNNE: Yeah.

5 THE COURT: But there is one small sliver of number of
6 creditors in your constituency who are going to get a -- do
7 better by the federal judgment rate. Right?

8 MR. DUNNE: Right, some will do better and some will
9 do worse.

10 THE COURT: Right.

11 MR. DUNNE: And we're just -- we're trying to call
12 balls and strikes, as the fiduciary for that, on the law. And
13 I think, to be fair, most of them have a higher rate than
14 the --

15 THE COURT: No, and the --

16 MR. DUNNE: Yeah.

17 THE COURT: -- briefs make that very clear.

18 MR. DUNNE: And so with respect to the history of the
19 statute, Your Honor -- and Judge Isgur got it right -- I'll
20 talk about the Fifth Circuit in a second, because they actually
21 have two decisions that came out -- is that he found --

22 THE COURT: Well, they only told me about the current
23 one, Ultra II.

24 MR. DUNNE: Yeah, Ultra II replaced Ultra --

25 THE COURT: Ultra I.

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1 MR. DUNNE: -- Ultra I, which was --

2 THE COURT: Right.

3 MR. DUNNE: The panel ruled in January and then --

4 THE COURT: No, I understand. But --

5 MR. DUNNE: Right, right. Right.

6 THE COURT: But are you saying there's another circuit
7 decision?

8 MR. DUNNE: No, no, no --

9 THE COURT: Okay.

10 MR. DUNNE: I'm not saying that. I'm saying --

11 THE COURT: Okay. Well --

12 MR. DUNNE: -- it's the January and --

13 THE COURT: But then Ultra I is --

14 MR. DUNNE: -- November decision.

15 THE COURT: -- history; it's on the cutting-room
16 floor. It's replaced by Ultra II. Right?

17 MR. DUNNE: Agreed --

18 THE COURT: Okay.

19 MR. DUNNE: -- though, to the point Your Honor was
20 making, Ultra I was basically saying, we don't think there's
21 any interest due and owing at all. And the solvent-debtor
22 corollary to the absolute-priority rule, which, under Du Bois
23 and Dow Corning, gets you contract rate, didn't -- they were
24 dubious that it applied. They said almost the exact opposite
25 to Judge Isgur this time, that, in a footnote, we do believe it

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1 survived the enactment of the Code and that you would subvert
2 the absolute-priority rule if you don't pay interest at the
3 contract rate.

4 So -- but all of this -- I'm going to take a step
5 back, because what's surprising to me is why don't they -- why
6 don't they impair the unsecured creditors? If you want
7 Cardelucci to more directly apply, impair them --

8 THE COURT: Well --

9 MR. DUNNE: -- because at what price
10 disenfranchisement, Judge?

11 THE COURT: Well --

12 MR. DUNNE: That's the point. At what --

13 THE COURT: Well, I mean, that's a funny theory here.
14 We'll impair them by making them -- everybody gets to vote, for
15 one thing. That's a good thing not to do, right? And
16 secondly, if you've got a case on point that is controlling,
17 why would you ever not take advantage of that? I mean, it's --

18 MR. DUNNE: Well --

19 THE COURT: I mean, obviously, the debtors' lawyers
20 would be crazy not to take advantage of it.

21 MR. DUNNE: Well, let -- there's a couple points
22 there. Obviously, we don't believe Cardelucci is
23 controlling --

24 THE COURT: I know.

25 MR. DUNNE: -- unless we were impaired and we're

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1 talking about the same fact pattern, where -- so they could
2 make it more on point. It's not on point now. But let's go
3 through that. But let's -- I think it's worth --

4 THE COURT: Well --

5 MR. DUNNE: -- taking a step back --

6 THE COURT: Mr. Dunne, you can make it even more on
7 point by having an insolvent debtor, in which case you can sit
8 down. I mean, the point is you want the debtor to -- you want
9 the plan to deal with insolvency. I mean, obviously the
10 shareholders wouldn't appreciate that. But from the --

11 MR. DUNNE: No, no --

12 THE COURT: -- debtors' point of view, that solves --
13 saves a lot of interest.

14 MR. DUNNE: No, what I'm saying is we believe
15 unimpairment requires post-petition interest.

16 THE COURT: Right.

17 MR. DUNNE: If our world was right -- well, let me
18 take a step back. You could do -- creditors can find
19 themselves in one of three positions; right? You could end up
20 being impaired in a class that has voted to accept.

21 THE COURT: No, I know.

22 MR. DUNNE: And if the class has voted to accept, all
23 you get is the best-interest test.

24 THE COURT: I know.

25 MR. DUNNE: Right? 1129(a)(7). That's the world

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1 Cardelucci was in, because that gets you to 726(a)(5) and the
2 legal rate.

3 And I don't know what opposing counsel's talking
4 about. The Ninth Circuit was quite clear; they were addressing
5 only, and they called it, the narrow issue presented by what's
6 the appropriate interest rate under 726(a)(5), the term, "the
7 legal rate".

8 THE COURT: But that's because, as I said -- and I
9 went back and read the underlying plan -- there was one
10 creditor and he was -- and his wife; they were impaired. So
11 there was nothing to talk about, about what do we do if he had
12 an unimpaired creditor. Just wasn't the issue.

13 MR. DUNNE: Oh, I agree.

14 THE COURT: But the --

15 MR. DUNNE: It wasn't the issue.

16 THE COURT: But the question is, and Mr. Tsekerides
17 makes the point, that the statute still is there; it is what it
18 is. 1124 might have been amended, but 502(b)(2) didn't get
19 amended. So what am I supposed to make a 502(b)(2) -- no
20 unmatured interest, period. Doesn't say, if you're unimpaired;
21 I mean, except when you're unimpaired. It could have done
22 that. It could have said, 502(b)(2) except if you're
23 unimpaired.

24 MR. DUNNE: But this is exactly where I think is the
25 slippery ice that we're skating on, which is now we're saying

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1 Congress, who clearly knew how to deal with statutory
2 impairment, they didn't do it. The words "the plan", which is
3 not actually just in 1124(1), it's in the lead-in to all the
4 subclauses of 1124.

5 THE COURT: That's right.

6 MR. DUNNE: We are now trying to make those two words
7 do such a heavy lift that when it says the plan leaves
8 unaltered all the legal contractual equitable rights, when we
9 know they just deleted the statutory impairment, subclause 3,
10 it means you've got to put us in the world we were right before
11 the bankruptcy. That is the price of disenfranchisement.

12 And I wanted to make a finer point on this with the
13 9th Circuit precedent, so let me just say I think that there's
14 a better precedent that proves the point than Cardelucci. And
15 let me just turn to it. And it's the Pacifica New Investments
16 case that came out in 2016.

17 Let me just set this up, because it proves the point,
18 both in terms of amendments and how despite congressional
19 actions in 1994, people make the same arguments and hope the
20 banks and you judges do the same thing, which is pre-1994 there
21 was the Entz-White principle.

22 THE COURT: Right.

23 MR. DUNNE: And this is dealing not with 1124(1). And
24 you're going to hear from the other side on rebuttal that that
25 makes all the difference in the world, that you're in 1124(2)

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1 and not 1124(1). So the Pacifica case is in 1124(2). The
2 question was, the Entz-White doctrine from the eighties allowed
3 you to cure defaults at the non-contractual default rate of
4 interest.

5 THE COURT: Right.

6 MR. DUNNE: Congress, then, in 1994, like they did
7 with respect to 1124(3), they corrected that, too. And they
8 added Section 1123(d), which says you have to provide them
9 everything due and owing under applicable law in their
10 documents in order to cure. Notwithstanding that amendment, we
11 go back up to the 9th Circuit to see whether a debtor can
12 unimPAIR them and reinstate them by not paying at the default
13 rate, by paying at the lower, non-default contract rate.

14 The 9th Circuit overruled for two reasons. The first
15 one, obviously, was the congressional action of Section
16 1123(d). We have that, too, in terms of the aggregation of
17 1124(3). But the second reason is the one I want to spend time
18 with, Judge. They said even if Congress hadn't done so, the
19 words of Section 1124(2)(e) would require the full default rate
20 of interest and --

21 THE COURT: This is Pacifica New Investments?

22 MR. DUNNE: Yes, this is Pacifica New Investments and
23 so I'm just going to quote -- I'll give you a cite for it.

24 THE COURT: Well, I think -- isn't it in your brief?

25 MR. DUNNE: Yes, it's in the brief.

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1 THE COURT: Yeah, okay. The quote is for a debtor to
2 render such a creditor unimpaired and unable to object to the
3 debtor's plan, the debtor must cure the default, but may not
4 "otherwise alter the legal, equitable, or contractual rights"
5 of the creditor.

6 I'm continuing with the quote. "Here, one of those
7 rights is post-default interest and New Investments cure may
8 not alter that right." This is 840 F.3d at 1142. And, Your
9 Honor, this is why the Cardelucci conversation befuddles me.
10 Because you know what's not in Section 1124 is the legal rate
11 of Section 726(a)(5) that Cardelucci was talking about.

12 You know what is in 1124(1)? The same language that
13 the 9th Circuit was interpreting in Pacifica. If you look at
14 1124(1), it says that the plan, "leaves unaltered the legal,
15 equitable and contractual rights to which such claim or
16 interest entitles the holder of such claim or interest."

17 Now we go to the 9th Circuit, Pacifica, 2016, three
18 years ago. It focuses on 1124(2)(e). And I'm quoting
19 identical language, "does not otherwise alter the legal,
20 equitable, or contractual rights to which such claim or
21 interest entitles the holder of such claim or interest." The
22 9th Circuit then goes on to say one of the interests -- one of
23 the rights that's embedded in that language is post-default
24 interest at the contract rate. And the ability to cure doesn't
25 alter that.

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1 They dismiss it in their brief because they say, well,
2 look, 1124(2) kind of makes my head spin. It's got
3 (a), (b), (c), (d) and only (e), so maybe the right to pay it at
4 the contract rate is embedded in (a) or (b) or something else.
5 The 9th Circuit said no. It's embedded in subclause (e), which
6 is the identical language to what we have in 1124(1).

7 And that, Your Honor, is why -- if you want the 9th
8 Circuit precedent, I think it's a mistake to follow Cardelucci,
9 because it's too easy --

10 THE COURT: No, I got it. So go back and say what you
11 just said again, that 1124(2) (e) circles us back to the
12 preamble? I mean --

13 MR. DUNNE: No, let me say --

14 THE COURT: I mean, I read the case and I'll read it
15 again, but I'm just looking at 1124(2) (e).

16 MR. DUNNE: Yes, so let me --

17 THE COURT: I'm reading it like you are.

18 MR. DUNNE: So let me go through it.

19 THE COURT: Okay.

20 MR. DUNNE: What I want to point out is obviously
21 statutory construction, Supreme Court Gustafson 513 US 561 at
22 570. "The normal rule of statutory construction is that
23 identical words used in different parts of the same act are
24 intended to have the same meaning." We have the identical
25 words in Section 1124(2) (e) and Section 1124(1).

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1 THE COURT: Okay. Now just stop there. Which
2 phrasing are you focusing on? I'm looking at them right
3 together, 1124(1) and 1124(2)(e). It's just that whole phrase,
4 right?

5 MR. DUNNE: It's the whole phrase. It's the whole
6 phrase.

7 THE COURT: I mean, the whole phrase.

8 MR. DUNNE: And what the 9th Circuit said is the
9 debtor must cure the default, but may not "otherwise alter the
10 legal, equitable, or contractual rights of the creditor."

11 THE COURT: But --

12 MR. DUNNE: One of those rights, the 9th Circuit said,
13 is post-default interest at the contract rate.

14 THE COURT: But let's go back to Ultra II. Ultra II
15 says you look to see where is the problem? Is it the statute
16 or in the plan? And the preamble, as you pointed out, 1124,
17 the preamble talks about impaired under a plan unless, and then
18 it says the plan does these things.

19 And I think what Mr. Tsekerides is arguing is the plan
20 isn't doing what you're blaming, the code is doing it. So --
21 so isn't -- how do I resolve that? Is that -- how do you get
22 to statutory interest rules with 502(b)(2) saying no post-
23 petition interests? It doesn't anything about impaired or
24 unimpaired. And we both know that it's not limited to solvent
25 or insolvent debtors. It says no post-petition interest,

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1 period.

2 And so how do I get around that with the message from
3 Ultra, at least -- and I understand it's not controlling -- but
4 it tells us look to see what the cause is. Is it in the plan
5 or in the statute?

6 MR. DUNNE: So let me go through this, because we're
7 mixing and matching.

8 THE COURT: Okay.

9 MR. DUNNE: I think I'd win under Ultra and I'd win
10 under Pacifica. But let's not kind of cross streams here,
11 because see, if we look at just the 9th Circuit precedent, the
12 9th Circuit in Pacifica didn't talk about Cardelucci being an
13 applicable rate or having anything to do with the same language
14 that I'm talking about, despite the words "the plan" in the
15 lead-in.

16 So we can say, now, maybe the 9th Circuit adopts
17 statutory impairment, but they haven't yet. All we have is
18 what we have from the Pacifica. If they adopted Ultra II whole
19 hog, Ultra -- the two Ultra decisions said, A -- because the
20 same argument about 726(a)(5) was made to the 5th Circuit, that
21 726(a)(5), in the best-interest test, is irrelevant to
22 unimpairment. And were going to remand for a finding of the
23 solvent debtor, corollary to the absolute-authority rule.

24 THE COURT: Well, but --

25 MR. DUNNE: Which gets you back to payment in full

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1 before the equity gets anything. It's a huge windfall for old
2 equity. It's a violation of the absolute-priority rule.

3 That's why --

4 THE COURT: Well, wait a minute. The last time I
5 checked, the absolute-priority rule applies for voting classes,
6 not unimpaired classes. So where do you get to invoke
7 absolute-priority rule for a class that doesn't get to vote?

8 MR. DUNNE: Well, there's two ways, Your Honor, though
9 I --

10 THE COURT: And by the way, absolute-priority rule is
11 1129(b)(2), as you know, in 1129(b), which kicks in only when
12 you don't have the votes of the impaired classes.

13 UNIDENTIFIED SPEAKER: Which is why they're
14 disenfranchising us, Your Honor.

15 THE COURT: Well, I know -- look, look --

16 MR. DUNNE: Think about the --

17 THE COURT: I know they're disenfranchising you, but
18 you're not a voter to begin with if you're unimpaired.

19 MR. DUNNE: But the --

20 THE COURT: So franchise and enfranchise of voting
21 concept and non-impaired people don't get to vote. So you
22 can't blame somebody who relies on the statute for
23 disenfranchising you.

24 MR. DUNNE: Your Honor, what I'm saying is it should
25 give all of us pause if we think Congress intended, after the

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1 deletion of 1124(3), for the outcome for a disenfranchised,
2 unimpaired creditor to be worse than if you were crammed down
3 upon.

4 THE COURT: I know.

5 MR. DUNNE: And so --

6 THE COURT: I got the sense of it. You make a very
7 persuasive argument, except I'm bound by a statute. I mean, a
8 case, unless you persuade me that I can ignore it because of
9 New Horizon -- I'm sorry, of Pacifica, excuse me.

10 MR. DUNNE: And, Your Honor, I do think you should
11 spend some time with that, because I think that's --

12 THE COURT: Well, I already have.

13 MR. DUNNE: But that's directly on point, in terms of
14 the language. They didn't get hung up by the plan. They
15 didn't get hung up by Cardelucci. They didn't view it as
16 applied. Now I read -- I think the better textual read, post-
17 deletion of the statutory impairments, sub-section 1124(3) is
18 that the plan wasn't intended to do it.

19 What the language doesn't say, Your Honor, is it
20 doesn't say the plan doesn't impair you. It says the plan
21 shall leave you unaltered, meaning it's asking you to go back
22 in time and leave you unaltered of all your legal, contractual,
23 and equitable rights. It would be actually a stronger argument
24 if it says the plan doesn't otherwise impair you. That's not
25 what it says, because then you say, oh, the statute's impairing

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1 me, but not the plan. It says you have to go and give them
2 everything they were entitled to under their contract, equity,
3 and the law. And that's where I think Your Honor should come
4 out and there's nothing in the 9th Circuit that says otherwise.
5 And frankly, it's consistent with the Pacifica case.

6 THE COURT: Remind me, because I don't remember the
7 facts of Pacifica. What was the issue that specifically teed
8 up the argument? Was it a post-petition interest question?

9 MR. DUNNE: It related to 1124(2), which is
10 reinstatement. And by the way, the reinstatement is the gap
11 questions that Your Honor was asking about before, so it may be
12 relevant here. But they said that they tried to reinstate a
13 creditor. And the question was what was the appropriate
14 interest rate between the petition date and the effective date?

15 THE COURT: For reinstatement, though?

16 MR. DUNNE: For reinstatement.

17 THE COURT: So the amount of interest wasn't relevant.
18 It was what to reinstate.

19 MR. DUNNE: No. It was the amount -- it was the rate
20 of interest, whether it was at the contract rate --

21 THE COURT: Contract rate or default rate.

22 MR. DUNNE: -- or default rate.

23 THE COURT: Yeah, okay, but that -- so it's a default
24 or non-default and you get to -- and so the critical lynchpin
25 would seem to be, you know, the cure default concept, which

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1 gets you back to Entz-White and so on, right?

2 MR. DUNNE: Correct.

3 THE COURT: Okay.

4 MR. DUNNE: But this is the point I want to make,
5 because the argument that they make is it's the cure concept
6 that actually bolted on something additional than you would
7 have if it was just 1124(1), right? Because 1124(1) is
8 identical to 1124(2)(e). But then you have (a), (b), (c) and
9 (d).

10 THE COURT: No, I know.

11 MR. DUNNE: Right. What the 9th Circuit said is it's
12 the opposite, is that previously we thought the cure concept
13 would allow you to pay less than the default rate. But the
14 catch-all, the (e) -- and it's conjunctive. You have to get
15 all --

16 THE COURT: I need someone to turn a phone off there
17 in the courtroom, please. Go ahead.

18 MR. DUNNE: That embedded in the plan does not
19 otherwise alter your legal, contractual, or equitable rights.
20 And it says directly, one of those rights is post-default
21 interest.

22 THE COURT: So my hypothetical avaricious, greedy
23 lawyer, who has an unreasonable claim for fees, is unimpaired
24 by every other definition. Does that lawyer get away with
25 unreasonable fees or not under 502(b)(4)? And so, what's --

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1 how do I get around this statutory construction rule?

2 MR. DUNNE: Well, there's two answers. And I'll talk
3 about PPI in a second.

4 THE COURT: No, but I want -- PPI's a breach lease
5 thing. My hypothetical lawyer didn't breach anything. He just
6 charged a lot of money.

7 MR. DUNNE: Right. Which means the debtors -- and we
8 see it today. Somebody referred to unimpairment and impairment
9 as happenstance. It actually is not. It's a volitional choice
10 by the debtors to either unimpair or impair.

11 THE COURT: But in my hypothetical, I told you the
12 creditor proposed the plan.

13 MR. DUNNE: Right. But in this case -- so let me deal
14 with -- our debtor should have --

15 THE COURT: Or somebody else proposed the plan and
16 says, oh, we're going to pay this lawyer his unconscionable fee
17 because that's what he's entitled to. So why do I get -- what
18 would we do if that were the case before me? Would I say
19 sorry?

20 MR. DUNNE: I think you have to impair him, Judge.
21 And I think that Your Honor would say it's not a plan proposed
22 in good faith, unless you impair them.

23 THE COURT: But that's so fact-driven. I mean --

24 MR. DUNNE: Or you say, under 1124(1), that
25 unconscionable is the word you just used, is not a set of their

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1 legal, contractual, or equitable rights associated with the
2 case.

3 THE COURT: Okay. I'm going to change the word
4 unconscionable to the statute reasonable. Now suppose under
5 state law, repo or unlawful detainer or some -- whatever some
6 state law that allows some large number of dollars for a lawyer
7 to collect, so we have where your hypothetical, where under
8 state law the lawyer is entitled to a --

9 MR. DUNNE: If it's lawful under state law, Your
10 Honor --

11 THE COURT: But 502 lets the bankruptcy court limit it
12 to reasonable, insiders and lawyers. Okay, so I'm pinning you
13 down. I'm not going to -- the only thing this lawyer did was
14 charge fees that were legally permissible under state law, but
15 the bankruptcy judge thought they were unreasonable. He didn't
16 propose the plan. Somebody else proposed it. And he didn't
17 choose to leave himself unimpaired. The proponent of the plan
18 did. My issue is, we are now at the confirmation hearing and
19 that lawyer says, judge, you can't reduce my fees to what you
20 think is reasonable because the plan unimpaired me. Now what's
21 the outcome? I'm sorry, I can't limit your fees to a
22 reasonable amount?

23 MR. DUNNE: Well, I'm struggling with the space
24 between reasonable. Meaning, you're positing a world where
25 it's lawful under state court and the proponent of the plan

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1 said in order to confirm this plan, we're willing to pay them
2 whatever is lawful under state court.

3 THE COURT: Yeah.

4 MR. DUNNE: Let's assume they stood up and said that,
5 Judge.

6 THE COURT: I am. I'm doing that because the
7 proponent of the plan didn't want to -- or chose not to invoke
8 the unreasonable standard, the unreasonable cap under
9 502(b) (4) .

10 MR. DUNNE: Well, that would be a determination that
11 the parties made that they wanted to pay them the amount that
12 was under state law. I mean, it's no difference than PG&E I,
13 right? PG&E I, the contract rate and the interest --

14 THE COURT: But I'm trying --

15 MR. DUNNE: Cardelucci was alive and well then.

16 THE COURT: But if the proponent of the plan in my
17 hypothetical proposes leaving this lawyer unimpaired, but
18 someone else, U.S. Trustee or another creditor, someone else
19 objects and says that fee is unreasonable, are you -- you're
20 saying that -- well, I don't know how you would reconcile. If
21 the bankruptcy court could limit that lawyer's fees to
22 reasonable, could it do it at the same time, while leaving that
23 lawyer creditor unimpaired?

24 MR. DUNNE: Look, I think you could do that under
25 state court, but you're positing a world that it's somehow not

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1 unconscionable but not reasonable. And I think you're either
2 doing it under state law, Your Honor, or you're telling them
3 you're not finding it in good faith, if it's such a quantum.

4 THE COURT: Okay. All right, well that's -- let's
5 stick with the -- actually with the real case. Go ahead and
6 tell me what else to do.

7 MR. DUNNE: Your Honor, so the -- I do think that we
8 should talk a little bit about the -- there was some discussion
9 about, you know, it's really equitable to just have one rate
10 that should apply to everybody. And I think that that is not
11 right, because then we're mixing and matching again between
12 class concepts and unimpairment.

13 THE COURT: Well, we might be mixing and matching, but
14 that's one of the problems. Isn't that exactly what Cardelucci
15 tells us about? If we have a rule that says everyone in the
16 class must be treated alike, how do we have different people in
17 the same class get different rates of interest?

18 MR. DUNNE: Right. And the lead in in 1124 says with
19 respect to each creditor, you're going to have to do this
20 unimpairment analysis. And if you're going to give everybody
21 their separate legal, contractual, and equitable rights, by
22 definition they're different. They were the day before --

23 THE COURT: Well, then what do we do? Different
24 classes? We put them all in different class?

25 MR. DUNNE: Well, unimpairment is close to that, Your

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1 Honor. We're not voting. I mean, it's kind of like the DIP
2 order because they didn't vote and they --

3 THE COURT: Well, no, but -- I know, but we have a
4 principle of bankruptcy law that says everyone in the class has
5 to be treated the same. And if you have a class that says I'm
6 going to give Joe one amount and Sally another amount, that
7 violates the treat them in the same way in the class rule.
8 Now, one way around it is to have two different classes, but
9 that invites voting and all sorts of other issues.

10 MR. DUNNE: All I'm saying is you keep -- there, you
11 can treat them all as unimpaired under 1124. And everyone's
12 going to have to see different outcomes that they would've had
13 under -- if we had all gone to state court on our particular
14 claims, with either contract rate or otherwise.

15 But two points on this, just to get it out. One is
16 there's cases that have said -- and this is the Kheel case --
17 equality among creditors who have lawfully bargained for
18 different treatment is not equity, but it's opposite.

19 THE COURT: Which case?

20 MR. DUNNE: It's Kheel, K-H-E-E-L, 369 F.2d 845 at
21 851. The other point is I think that the Court should be
22 concerned also about the equities between the classes. The
23 Court should be concerned about --

24 THE COURT: How can I do that? How can I do that?

25 MR. DUNNE: Well, A --

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1 THE COURT: The proponent of the plan puts people in
2 classes and chooses to impair them or unimpaired them. And if
3 somebody objects to what class he or she is in or it -- then we
4 deal with it. I don't independently sit there and say, that's
5 bad classing, Mr. Tsekerides. You've got to change the
6 classes. That's not --

7 MR. DUNNE: Well, part of this is that I'm not sure
8 where the Court is going, because I think that you don't need
9 to get there because I think the text says that we get it at
10 the contract rate and Pacifica New Investments says that. If
11 you say, well, no, we think the words, "the plan", which
12 qualifies all the subclauses, actually means that 502(b)(2)
13 chops the head off of all the interest, then Your Honor is
14 right. Then maybe the answer is no, that you don't get any
15 interest.

16 So what's the basis for applying it, other than the
17 fact that there's been no court that has done that since it was
18 repealed in 1994 with the express intention of providing
19 unsecured creditors with their contract rate of interest
20 after -- if they're unimpaired?

21 So if we're talking about equities -- because you've
22 got to say, well maybe, Your Honor -- which was what I thought
23 Your Honor was saying -- is that the legal, contractual, and
24 equitable rights of claim includes the equitable rights under
25 the bankruptcy code. That, of course, would be more 1129,

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1 because that's the only place where equitable shows up. It
2 doesn't show up in 1129(a)(7). And then you could get into the
3 maxims that equity apportions a windfall and we're trying to
4 reallocate value, hundreds of millions of dollars, from the
5 unsecured creditors to the old equity.

6 And that's what -- I mean, that's the violation of the
7 absolute-priority rule, which Your Honor should be concerned
8 about, that they're trying to back into by getting an extreme
9 reading of unimpairment. They're trying to ask you to go
10 farther than any court has done.

11 THE COURT: I don't -- listen, you can put all sorts
12 of motives on them. To me, the issue is if you start with a
13 solvent debtor, which we're starting with, and we believe that
14 the Cardelucci controls, then the answer is simple. You get
15 interest, but it's not your choice. It's not the contract
16 choice. It's the federal rate, end of story. If you say,
17 well, let's ignore the federal rate, then Mr. Tsekerides would
18 argue, as I was questioning, then you get nothing. Your
19 argument is you get it because of your interpretation and the
20 way you want me to read 1124. And that's -- those are the
21 choices.

22 MR. DUNNE: And I think that Your Honor, on that,
23 that, Your Honor should look at the kind of evolution and
24 maturation of 1124.

25 THE COURT: Yeah, I understand.

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1 MR. DUNNE: And the deletion of 1124(3) and the use of
2 allowed amounts and the statutory canons that go with it, that
3 we have to assume -- using the word "allowed amount" was
4 unnecessary, if the plan meant what they mean.

5 THE COURT: Well, but really, what you're telling me
6 is, I guess, that Cardelucci came -- well, let's say -- remind
7 me again, you've said it here -- Cardelucci came before sub 3
8 was removed, right?

9 MR. DUNNE: No, Cardelucci came after, because --

10 THE COURT: Okay, okay.

11 MR. DUNNE: -- sub 3 was --

12 THE COURT: Okay, so let's -- so therefore, okay,
13 that's right. We know that's right. So sub 3 got eliminated.

14 MR. DUNNE: In '94, yeah.

15 THE COURT: So Congress changed the law to where it
16 was. Then Cardelucci decided what it decided. And the only
17 question, it seems to me, at the trial level is do I -- am I
18 bound by Cardelucci? If so, end of story. If not, what's the
19 rule? And maybe Pacifica is the rule. I don't know.
20 Pacifica, obviously -- if your argument is Cardelucci doesn't
21 control because Pacifica does?

22 MR. DUNNE: It's two --

23 THE COURT: Let me state it differently. Would we be
24 having this discussion if Pacifica had never been issued? I
25 don't -- would I have any choice at all, as a trial court in

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1 the 9th Circuit?

2 MR. DUNNE: Yes, because --

3 THE COURT: Nothing changed. In other words, you
4 corrected me that the statute got changed, then Cardelucci came
5 down. So unless I could distinguish it, which I don't know how
6 I would do, I'm bound by it. But if --

7 MR. DUNNE: So the question is -- what you're asking,
8 Your Honor, is let's assume Pacifica doesn't exist for a
9 second. And all we had was Cardelucci from the 9th Circuit.
10 I think you answered the question, now that I think about it.
11 If the Court said in the tentative that, forget about fair and
12 equitable, that's an 1129 concept. We never get there unless
13 you're an impaired class. That's Cardelucci. You never get to
14 the best-interest test of 1129(a)(7) unless you're an impaired
15 class.

16 The answer to 1129(b) -- and Your Honor's right on
17 that -- can't be different than 1129(a)(7). And yet, we're --
18 somehow people have convinced the Court that it's broader.
19 When you read the first paragraph and the last paragraph, they
20 said it's a narrow issue presented. And then at the end, they
21 say all we're dealing with is definitive meaning for a precise
22 statutory term, the legal rate. You know what doesn't appear
23 anywhere in 1124? Is the legal rate. The very words --

24 THE COURT: So what you want me to do is be persuaded
25 that -- this is what we started half an hour ago -- 724 doesn't

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1 apply? 1124 finishes the start -- controls.

2 MR. DUNNE: Right, can't control. That's the price of
3 disenfranchisement is we don't talk about all the 1129 --
4 that's what I'm saying, Your Honor.

5 THE COURT: Okay.

6 MR. DUNNE: And I would be making the same argument
7 about the language that I just happened to have with luck that
8 the 9th Circuit had addressed three years ago about that
9 language including the right to contract rate --

10 THE COURT: And it seems to me that -- well, never
11 mind. You need to let the other counsel do it. And you said
12 you wanted to reserve a few minutes. I guess I'll let you do
13 it. Let's go ahead and let the other counsel --

14 MR. DUNNE: I appreciate that, Your Honor. Thank you
15 very much.

16 THE COURT: Thank you.

17 MR. QURESHI: Good morning, Your Honor.

18 THE COURT: Hi.

19 MR. QURESHI: For the record, Abid Qureshi, Akin Gump
20 on behalf of the ad hoc no vote committee.

21 THE COURT: Yes, sir. Good to see you again.

22 MR. QURESHI: Your Honor, I won't retread the ground
23 that Mr. Dunne plowed. I want to talk about the absolute-
24 priority rule. But I do want to address just one question that
25 came up in the colloquy toward the end of Mr. Dunne's argument.

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1 If Pacifica didn't exist, the Court then asked the
2 question, well, am I then stuck with Cardelucci? Answer: no.
3 Our argument is not dependent upon Pacifica, because the thrust
4 of the argument is that Cardelucci does not address either 1124
5 and what is impairment, or 1129(b).

6 THE COURT: Okay, I agree. It doesn't.

7 MR. QURESHI: Right --

8 THE COURT: But why am I not bound by it anyway,
9 unless Pacifica can be read to interpret or to change the
10 ground rules? I mean, don't I have to follow by any precedent,
11 unless I can persuade it that it's not binding?

12 MR. QURESHI: Unless you are persuaded that it's not
13 binding. And our position --

14 THE COURT: Right. But the narrow issue -- the narrow
15 issue is insolvent cases, you get the federal rate of interest,
16 period.

17 MR. QURESHI: What --

18 THE COURT: That's the narrow issue.

19 MR. QURESHI: The thrust of the debtors' argument is
20 to take Cardelucci, that as Mr. Dunne explained, was designed
21 to interpret a narrow provision in a section of the code that
22 is not relevant here, and apply it across the board, and in
23 doing so, functionally read out 1124 and 1129(b). And that
24 allows Cardelucci to do much more than it was intended.

25 THE COURT: But whatever the author Judge Zilly

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1 intended, it is what it is and to me. And because Mr. Onink
2 was impaired, at least the question of the absolute-priority
3 rule might have applied. If you're unimpaired, don't you agree
4 with me, absolute-priority rule is a non-issue? It's a non-
5 issue, right? You don't even get to invoke it, do you? If
6 you're unimpaired?

7 MR. QURESHI: I agree.

8 THE COURT: You agree? Okay, so if Cardelucci is a
9 narrow issue, to me, the narrow issue is in a solvent case,
10 what's the proper rate of interest? What could be more narrow
11 than that? I mean, is it -- well, it's a little broader if we
12 have unimpairment versus impairment? I mean, to me, it's a
13 narrow question.

14 And that's why -- listen, I don't have a stake in the
15 outcome. I'm not rooting for one side or the other. I have to
16 follow controlling law. And if the controlling law doesn't
17 give me any options, I don't have a choice. So you need to
18 tell me why I have a choice. And I'm not persuaded that 1129
19 is a choice, as long as the plan has your class unimpaired.

20 MR. QURESHI: So if Your Honor looks at the equitable
21 considerations that are referred to in the Cardelucci decision,
22 where Cardelucci talks about where there are only a few
23 unsecured creditors that are seeking post-petition interest and
24 there are sufficient assets to play -- to pay all claims for
25 all interests, then Cardelucci says there will be no concerns

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1 regarding the equity among creditors.

2 THE COURT: Where do you --

3 MR. QURESHI: It's the penultimate paragraph.

4 THE COURT: Excuse me, you're reading it right at the
5 end there? Okay.

6 MR. QURESHI: It's the penultimate paragraph of the
7 decision.

8 THE COURT: Okay.

9 MR. QURESHI: And so, in those instances, the court
10 says that the concern is a different one, that the debtor may
11 receive a windfall. And, Your Honor, that's why solvency
12 matters. That's the situation here. Here, the debtor has said
13 to the Court they have the ability to pay contract rate
14 interest to all creditors without reducing the recovery to any
15 creditors, importantly, including the wildfire victims.

16 THE COURT: Did Mr. Cardelucci have the ability to pay
17 the higher rate of interest?

18 MR. QURESHI: That I don't know, Your Honor.

19 THE COURT: Well, I just told you I know, because they
20 stipulated around and confirmed a plan and reserved this one
21 issue. So I'm reading -- and look, we're back to the
22 fundamental question, here. If Cardelucci was insolvent, would
23 the case have ever even happened?

24 MR. QURESHI: If Cardelucci was insolvent, no.

25 THE COURT: And God forbid, if PG&E is insolvent,

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1 we're finished with this argument also, aren't we?

2 MR. QURESHI: Agreed. If PG&E were insolvent, that's
3 right.

4 THE COURT: So therefore, whether it's a big case or a
5 little case or whether they have the ability to pay or not
6 doesn't matter. The question is, if they're solvent and if
7 your class is unimpaired or impaired, either way, solvent
8 debtors don't pay post-petition interest. Why? Because
9 502(b)(2) says they don't.

10 MR. QURESHI: All right. So let's start with that.
11 That's not what 502(b)(2) says. 502(b)(2) says you're not
12 entitled to unmatured interest. Post-petition interest is not
13 unmatured interest. It's interest on an allowed claim. So
14 it's not --

15 THE COURT: Well, the day after petition date the
16 interest for the future is still unmatured, isn't it? Doesn't
17 it mature each day, that each day goes by?

18 MR. QURESHI: Your Honor, yes. If the bonds were
19 reinstated, then of course, interest would continue to accrue.
20 But the prohibition in 502(b)(2) on unmatured interest cannot
21 be read to say that it prohibits contract rate interest on a
22 claim or post-petition interest of any other rate by a claim.

23 THE COURT: Well, if the case were liquidated in
24 Chapter 7, what would the trustee pay?

25 MR. TSEKERIDES: If the case were liquidated in

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1 Chapter 7, Your Honor, then you're back to legal rate. And
2 legal rate is what Cardelucci interprets.

3 THE COURT: Which --

4 MR. TSEKERIDES: Which is FJR.

5 THE COURT: But it interprets it in a case where
6 Cardelucci's case was not liquidated. So the Ninth Circuit
7 says, here is a Chapter 11 debtor, post confirmation. We're
8 dealing with an issue, Cardelucci's case was not liquidated in
9 Chapter 7, never was in Chapter 7, and we're applying a rule,
10 that's better than not applying a rule, instead going to
11 502(b)(2), which means Onink would get nothing.

12 Anyway, I'd like you -- we're going around in circles.
13 Go ahead, tell me what I should do, but --

14 MR. TSEKERIDES: Well --

15 THE COURT: -- your colleague also has already told
16 me.

17 MR. TSEKERIDES: Yeah, so, Your Honor, I want to go
18 back and talk about Ultra II because I think what the court did
19 there is obviously -- could not be more recent, and what --

20 THE COURT: That's for sure.

21 MR. TSEKERIDES: That's for sure. And what the court
22 did is it upheld this distinction of code impairment v. plan
23 impairment. But that clearly cannot be, and was not in Ultra,
24 the end of the analysis --

25 THE COURT: No. I know that.

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1 MR. TSEKERIDES: -- right? Because what Ultra did, is
2 Ultra nonetheless sent it back down to the bankruptcy court and
3 said you now need --

4 THE COURT: Figure out these two things.

5 MR. TSEKERIDES: Figure out these equitable
6 considerations.

7 THE COURT: What would that panel of judges done if
8 they were hearing Ultra in the Ninth Circuit?

9 MR. TSEKERIDES: I'm sorry?

10 THE COURT: What would those three judges have done if
11 they had been graciously redeemed from Texas and placed down at
12 7th and Mission and said despite your progeny and your
13 provenance, you are Ninth Circuit judges today, apply the rule.
14 They wouldn't send it back to figure out their interest rate,
15 would they?

16 MR. TSEKERIDES: Well, I don't think that they would
17 have looked at Cardelucci and said well, that's the result,
18 it's FJR.

19 THE COURT: Well, they would have said, well, are we
20 bound by Cardelucci, yes or no? And if the answer --

21 MR. TSEKERIDES: Right.

22 THE COURT: -- and if they concluded they were not,
23 obviously they would do something different.

24 MR. TSEKERIDES: Right.

25 THE COURT: But it struck me as that -- because the

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1 bankruptcy judge went the way the creditors want, the Ultra II
2 says under Fifth Circuit, there is no controlling precedent on
3 post-petition interest, so send it back to the judge to
4 determine it.

5 And this notion of a solvent exception, how could
6 there be a solvent exception in this case, when the only way
7 you ever get to the post-petition interest is if you're
8 solvent, unless your theory is correct?

9 MR. TSEKERIDES: Well, again there's two ways in the
10 solvent-debtor universe, right to get to post-petition
11 interest. First is, you get unimpaired under 1124(1),
12 unimpaired the way we read, and we thinks it's appropriate to
13 read 1124, which is in a solvent case, you're entitled to your
14 contract rate, or through 1129(b) and the application of the
15 fair and equitable test.

16 And fundamentally, Your Honor, what I think it boils
17 down to is 1129(b), as we all know, embodies the absolute-
18 priority rule, right and in case of a solvent debtor, I think
19 it's important to step back a minute and talk about what that
20 rule means.

21 What are they trying to do here? What the debtors are
22 trying to do is take hundreds of millions of dollars and give
23 it to equity before creditors are --

24 THE COURT: I --

25 MR. TSEKERIDES: You obviously --

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1 THE COURT: I'm well aware of the consequences.

2 MR. TSEKERIDES: Right, and so, Your Honor, what I
3 think we're fundamentally saying is whether you look at this
4 through the lens of 1124 and what does unimpairment truly mean,
5 or 1129(b) and what is fair and equitable, is -- you get to the
6 same principle, and it's what the Fifth Circuit in Ultra II
7 says. It says, "Absent compelling equitable considerations,
8 when a debtor is solvent, it is the role of the bankruptcy
9 court to enforce the creditor's contractual rights."

10 Two paths to do it. A proper reading of unimpairment
11 under 1124(1) or if they impair us, which they should, 1129(b)
12 and the fair and equitable test.

13 THE COURT: Well, you say if -- which they should. I
14 mean I -- this is the first time I recall a creditor's lawyer
15 asking to be impaired. But you're a creditor's lawyer whose
16 client would like hundreds of millions of dollars of interest
17 that it believes it's entitled to, and so I'm not faulting you
18 for making the argument.

19 I'm saying that's a great argument, but what do we do
20 about it and so I don't know how, as long as the plan proponent
21 has chosen to take the view that your claims are unimpaired, I
22 don't know how you can play the 1129(b) card, because I don't
23 think it's in your hand, it wasn't dealt to you.

24 MR. TSEKERIDES: Your Honor, I understand that, and
25 fundamentally what I'm saying is I don't need to in this

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1 circumstance, because a proper application of 1124 gets me to
2 the same place.

3 THE COURT: Okay, fair enough.

4 MR. TSEKERIDES: That's the answer, okay.

5 THE COURT: Fair enough.

6 MR. TSEKERIDES: And the Ninth Circuit, in the L&J
7 case talks about --

8 THE COURT: No, I know.

9 MR. TSEKERIDES: -- the broadest possible reading of
10 unimpairment and what it means, so I think --

11 THE COURT: Well, and maybe the L&J panel would have
12 said to the Cardelucci panel, that guy is impaired, but nobody
13 raised the issue, it wasn't within the narrow issue.

14 I mean, I can't sit here and get Sixth Circuit judges
15 to reconcile their views. I grant you, L&J says what it says,
16 you can impair by a little checkmark, but -- well, your view is
17 really no different from Mr. Dunne's, I mean, you're telling me
18 that I should feel that I'm not bound by Cardelucci because
19 1124, at the minimum, offers an outlet that -- well, I don't
20 know how, even if I am of that view, I'm still stuck unless I'm
21 of the view that Pacifica changes the rules.

22 Again, do you agree with that? I mean, what are my
23 choice -- if you said if there's no Pacifica, so I'll put it
24 back to you again. If Pacifica didn't exist, how would I have
25 any option to get around the outcome of Cardelucci?

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1 MR. TSEKERIDES: If Pacifica doesn't exist, Cardelucci
2 still does not govern the proper interpretation of 1124.

3 THE COURT: But see, you believe, I'm sure, that
4 Cardelucci is wrong, and I may believe it's wrong, but I don't
5 have a choice.

6 MR. TSEKERIDES: No, actually, Your Honor, I don't
7 believe that Cardelucci is wrong.

8 THE COURT: Okay.

9 MR. TSEKERIDES: I believe that Cardelucci is simply
10 inapplicable to the circumstances here.

11 THE COURT: Okay, but I'll go back --

12 MR. TSEKERIDES: Because Cardelucci --

13 THE COURT: -- to the same question. All right, so
14 what are the factual differences -- I mean the legal
15 differences?

16 Cardelucci is an impaired creditor on a solvent estate
17 who wants contract rate of interest. Here we have unimpaired
18 creditors of a solvent estate who want contract interest. So
19 that's the only difference, isn't it? Isn't that the only
20 difference, that impaired -- one class of one -- PG&E here or
21 you're unimpaired and Cardelucci, unimpaired.

22 MR. TSEKERIDES: Well --

23 THE COURT: I'm sorry, excuse me, reverse.

24 MR. TSEKERIDES: No, because in Cardelucci, you get to
25 the application of 726(a)(5) and therefore --

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1 THE COURT: No, but that --

2 MR. TSEKERIDES: -- the question of what the legal
3 rate means.

4 THE COURT: But what are the facts that make the
5 alignment? In other words, if you were teaching a law school
6 class and I said -- your opening lecture is, today we're going
7 to learn about what is the applicable rate of interest in a
8 solvent estate. You might then say, that has an impaired class
9 of creditor, or you might just stop at the way I stated it,
10 but -- or you might have said, but I'm also going to teach you
11 what's the same rule in an estate that has an unimpaired class.

12 Isn't that the only difference really, in the
13 analysis? Not the 726 says what it says, or not. It's -- as I
14 said, if we ignore 726, you're worse off unless the 1124
15 argument carries the day.

16 MR. TSEKERIDES: Right, it, well -- and only worse
17 off, again, if 502(b)(2) is read as a bar for any kind of post-
18 petition interest, which, in light of the history that Mr.
19 Dunne took the Court through, I don't think can be the case.
20 You --

21 THE COURT: Okay.

22 MR. TSEKERIDES: Your Honor, let me just wrap up
23 with --

24 THE COURT: Yeah.

25 MR. TSEKERIDES: -- this thought, which is, I think

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1 that what the debtors are doing through their proposal to this
2 Court to apply Cardelucci far more broadly than we think it
3 stands for, is functionally to read out of the Code the
4 absolute-priority rule.

5 THE COURT: Well, again, you keep saying that.

6 MR. TSEKERIDES: Yeah.

7 THE COURT: And I don't know how we do it, since you
8 can't invoke it. Again, am I wrong on that? If your
9 argument -- you, you as counsel representing a member of an
10 unimpaired class, can you make me 1129 argument?

11 MR. TSEKERIDES: What I am saying to be very clear,
12 Your Honor, is that the standard is the same whether you are
13 looking at 1124 and what constitutes impairment, or 1129(b),
14 and what is fair and equitable.

15 THE COURT: Okay.

16 MR. TSEKERIDES: Because in the case of a solvent
17 debtor, the equitable considerations are different and those
18 equitable considerations are the same, whether in the 1124
19 analysis, or in the 1129(b) analysis. So functionally, it
20 collapses to one test, that's what I'm saying.

21 THE COURT: Okay, I got you. Thank you very much, Mr.
22 Tsekerides.

23 MR. TSEKERIDES: Thank you.

24 THE COURT: All right, and I'm sorry, whose going to
25 make the argument? I just didn't hear your name.

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1 MR. MCGILL: Your Honor, my name is Matthew McGill.

2 THE COURT: Oh, Mr. McGill.

3 MR. MCGILL: Gibson, Dunn & Crutcher, and I'm here for
4 the ad hoc committee of trade claims.

5 THE COURT: Okay, good morning, Mr. McGill.

6 MR. MCGILL: Good morning. I have just three points I
7 want to make, Your Honor. First to your question about the
8 application of Cardelucci. You are bound, of course, by
9 holdings of the Ninth Circuit.

10 The holdings of the Ninth Circuit are defined by the
11 question presented to it. And the question presented, as
12 stated by the Ninth Circuit in Cardelucci is as follows, and
13 this is at page 1234 of the opinion.

14 "The question presented by this appeal is whether
15 interest at the legal rate means a rate fixed by federal
16 statute, or rate determined by the parties' contract or state
17 law."

18 That was the only issue before the court in Cardelucci
19 because as you noted, and I also went into the Cardelucci case
20 file and looked at the plan, they had stipulated to resolve all
21 disputes but that one. What is the interest rate to apply,
22 because they acknowledged, because they were an impaired class,
23 the application of 726(a)(5) through the best-interests-of-the-
24 creditors test.

25 THE COURT: Right.

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1 MR. MCGILL: And that is why 726(a)(5) applied there,
2 because the Oninks were impaired. They are not impaired
3 here -- these creditors here are being asserted to be
4 unimpaired, and because they are unimpaired, 1129(a)(7) and the
5 best-interest-of-the-creditor test does not apply.

6 THE COURT: Right.

7 MR. MCGILL: Cannot apply. So the question then
8 becomes, did Cardelucci resolve the question as to an
9 unimpaired class, as to whom the best-interest-of-creditors
10 test cannot apply?

11 And the answer to that is no. And we know that for at
12 least two reasons. First is the Ninth Circuit's decision in
13 Sylmar, which comes just eight months after Cardelucci, awards
14 contract rate post-petition interest and makes no mention of
15 the legal rate and that was, unlike Cardelucci, an unimpaired
16 class -- contract rate for the unimpaired class.

17 But the even more powerful point here is that the
18 plain text of the Bankruptcy Code prohibits application of
19 726(a)(5) to an unimpaired class. As I think everyone here --

20 THE COURT: And why is that so?

21 MR. MCGILL: Section 103(b) of the Code says, "Chapter
22 7 can apply only to Chapter 7."

23 And Section 1129(a)(7), then imports Chapter 7
24 concepts, but only as to an impaired class.

25 THE COURT: But the Cardelucci case didn't do that

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1 kind of fine tuning.

2 MR. MCGILL: Well, but it had -- the issue before it
3 was only to define what is the legal rate.

4 THE COURT: Yeah, but what I'm saying is, would you
5 have been happy as a creditor's lawyer if Cardelucci said we
6 can't impose Chapter 7 at all?

7 MR. MCGILL: Yes.

8 THE COURT: And then you'd go to Chapter 5 for 503 --

9 MR. MCGILL: Yes, and in fact --

10 THE COURT: -- 502(b)(2), and all interest is gone.

11 MR. MCGILL: So no, Your Honor, and this is the third
12 and maybe the most important point.

13 THE COURT: Okay.

14 MR. MCGILL: Which is that 502(b)(2) is not, as you
15 said, the culprit in your tentative order.

16 THE COURT: Okay.

17 MR. TSEKERIDES: So when the Code was enacted, in
18 1978, 502(b)(2) took the place of Section 63 of the old
19 Bankruptcy Act. Under Section 63 of the old act, it had been
20 the law maybe since 1911 when the Fifth Circuit decided Norris,
21 and certainly by 1949 when the Supreme Court of the United
22 States decided Saper vs. City of New York, it had been the law
23 that Section 63 does not bar the payment of post-petition
24 interest, as against a solvent debtor.

25 That had been the consistent application of Section 63

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1 as confirmed in Saper, and then if you want something more
2 recent, you look to the Supreme Court's 1989 decision in Ron
3 Pair Enterprises.

4 THE COURT: Well, Ron Pair -- did Ron Pair deal with
5 that issue though?

6 MR. MCGILL: Ron -- no, Ron Pair doesn't deal -- but
7 Ron Pair notes what Saper said, that Sa- -- that Ron Pair said
8 that the Code practice, I mean, the practice under the Act had
9 been to allow post-petition interest as against a solvent
10 debtor. So then you go -- so the question becomes, does
11 502(b)(2) change that well-established bankruptcy practice of
12 payment of post-petition interest as against a solvent debtor,
13 and that answer is provided by the Supreme Court's decision in
14 Cohen v. De La Cruz, where the Supreme Court said we're not
15 going to ascribe to the Act an intention to upend settled
16 bankruptcy practice unless Congress has clearly intended that.

17 And I think if you look as -- and there is no such
18 clear expression of intent to upend that clearly settled
19 practice of payment of post-petition interest as against a
20 solvent debtor. There is no such expression anywhere.

21 THE COURT: Well, Cohen, I mean, Cohen is cited for
22 the proposition that we take congressional changes in with some
23 history, but it has nothing to do with the issue, obviously; it
24 has to do with the non-dischargeability of --

25 MR. MCGILL: But that was the --

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1 THE COURT: -- of the wrongdoer, that has nothing to
2 do with anything; but it has to do with what carries on from
3 the prior law to the current law, right?

4 MR. MCGILL: That is the interpretive principle --

5 THE COURT: Right.

6 MR. MCGILL: -- I am urging upon you --

7 THE COURT: Right. Okay.

8 MR. MCGILL: -- is that what carries over. So the
9 Section 63 Act practice carries over under 502(b)(2). That is
10 why it is not the culprit. 502(b)(2) permits the payment of
11 interest, post-petition interest, in a solvent-debtor case.
12 That's been the law since 1911. So this --

13 THE COURT: So, excuse me. What you want me to do is
14 say the law's been since 1911, but in 1979 when the new Code
15 went into effect, you want me to say therefore notwithstanding
16 502(b)(2), that principle carried over from a hundred years
17 earlier?

18 MR. MCGILL: It's not notwithstanding, Your Honor.

19 THE COURT: Well --

20 MR. MCGILL: Because a careful reading of the text --

21 THE COURT: Let's say it a different way. That
22 principle survives to this day.

23 MR. MCGILL: It absolutely does.

24 THE COURT: And then what -- has any court under the
25 Code said that?

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1 MR. MCGILL: Yeah, Dow Corning, certainly.

2 THE COURT: Any -- any court that's controlling
3 precedent, Supreme or Circuit Court?

4 MR. MCGILL: Well, I think the Supreme Court
5 acknowledges it in Ron Pair that this is what the pre-Act
6 practice was -- pre-Code practice was, so -- and there's
7 certainly no indication to upset it, to upset that pre-Code
8 practice. And if you look at the text of the statute again, I
9 think our argument is firmly rooted in the text of the statute.
10 Their argument has no textual mooring at all.

11 THE COURT: Their argument has a Ninth Circuit case on
12 point, unless --

13 MR. MCGILL: No --

14 THE COURT: -- it's not on point --

15 MR. MCGILL: Right --

16 THE COURT: -- because of somehow the -- this concept
17 that --

18 MR. MCGILL: Your Honor --

19 THE COURT: But the concept of impaired and non-
20 impaired didn't exist under the Act either.

21 MR. MCGILL: That's --

22 THE COURT: So --

23 MR. MCGILL: But --

24 THE COURT: -- what you want me to do is to say that
25 based upon the history, the concept of interest to a -- in a

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1 solvent case, post-petition interest in a solvent case, is
2 still alive and well, but there isn't a lot of case law to
3 support that. I'll take your word for it that Dow Corning
4 might --

5 MR. MCGILL: But --

6 THE COURT: -- have said it and I don't remember --

7 MR. MCGILL: Well, that --

8 THE COURT: -- I'll believe you, I don't question
9 that.

10 MR. MCGILL: Dow Corning actually has a great
11 explication of this precise issue, of why 502(b)(2) does not
12 prohibit the payment of post-petition interest, and why it --
13 the Sec- -- the old pre-Code practice --

14 THE COURT: Mr. McGill, there are a lot of Dow Corning
15 cases, is this the Court of Appeals decision or the bankruptcy
16 court?

17 MR. MCGILL: No, this is the Bank- -- I'm talking
18 about the bankruptcy court decision.

19 THE COURT: Okay. Can you -- but there's several of
20 them, would you --

21 MR. MCGILL: Yes --

22 THE COURT: -- is that --

23 MR. MCGILL: It's 244 Bankruptcy Reporter --

24 THE COURT: Okay.

25 MR. MCGILL: -- 678.

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1 THE COURT: 678. Okay.

2 MR. MCGILL: And the main discussion starts, you know,
3 around page 682.

4 THE COURT: Okay. So you believe that that stands
5 for -- whether it's binding or not, we know it isn't, but it
6 stands for the proposition that the pre-Code practice is still
7 alive and well, at least in that court.

8 MR. MCGILL: The pre-Code practice --

9 THE COURT: Fine.

10 MR. MCGILL: -- is alive and well. My point to you
11 though, Your Honor, is that under 1129(a)(7) -- well, let me
12 take -- the only way to apply 726(a)(5), the only way, is under
13 the best-interests-of-the-creditor test. And that, as
14 1129(a)(7) says, it applies only with respect to each impaired
15 class. You cannot apply the best-interest test, as you noted,
16 to an unimpaired class.

17 THE COURT: Right.

18 MR. MCGILL: So if we are unimpaired, there is no
19 textual vehicle through which the Court can apply 726(a)(5).
20 They are urging that you just reach out and grab it and say
21 that Cardelucci mandates that you do so, and I'm saying that is
22 contrary to Section 103(b) of the Code. You can't do that, the
23 Ninth Circuit would not have told you that you must because the
24 text of 103(b) is absolutely plain on this point. You can't
25 apply provisions of Chapter 7 in a Chapter 11 case.

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1 THE COURT: I know, but that proves too much because
2 if we know that the Chapter 11 rule is that you don't get to
3 confirm a plan if creditors would do better in Chapter 7. So
4 it doesn't -- it isn't as though you're importing the statutory
5 test, you're doing -- you're pulling up a mirror to say if we
6 liquidated this debtor --

7 MR. MCGILL: Yes.

8 THE COURT: -- would creditors do better than if we
9 leave this debtor in Chapter 11? That doesn't apply --

10 MR. MCGILL: But --

11 THE COURT: No, come on. That doesn't mean the
12 Section itself applies, it means we test. Will this Chapter 11
13 be better or equal to what this Chapter 7 test would be?

14 MR. MCGILL: But you can only do that, Your Honor,
15 because Section 1129(a)(7)(A)(ii) explicitly says that you have
16 to examine whether such holder would receive or retain if the
17 debtor were liquidated under Chapter 7.

18 THE COURT: I know, we have it all the time in
19 dischargeability and Chapter 13 cases. I mean, I'm quite
20 familiar with the principle.

21 MR. MCGILL: Right. So it is only where the Code
22 explicitly brings in Chapter 7 that you can do it. There is no
23 explicit bringing in of Chapter 7 with respect to an --

24 THE COURT: No --

25 MR. MCGILL: -- unimpaired class.

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1 THE COURT: Mr. McGill, we just differ with whether it
2 brings it in or it makes a -- takes a snapshot and compares it,
3 you know, compare this picture with this picture. But anyway,
4 go ahead with the rest of your argument.

5 MR. MCGILL: Well, that --

6 THE COURT: No, I need to move it along. I promised
7 the other side, so just make your point.

8 MR. MCGILL: Yeah, so --

9 THE COURT: I got the point.

10 MR. MCGILL: That -- that's it, Your Honor. The plain
11 text of the Code provides no application of 726(a)(5) to an
12 unimpaired class of creditors.

13 THE COURT: So I'll ask you the same question I asked
14 Mr. Dunne and Mr. Qureshi. How do I as a trial judge in the
15 Ninth Circuit ignore the holding of Cardelucci?

16 MR. MCGILL: The holding of Cardelucci is that the
17 legal rate --

18 THE COURT: But how do I articulate, if I were to
19 issue a ruling in your favor --

20 MR. MCGILL: Yes.

21 THE COURT: -- how would I say it? Say it for me.

22 MR. MCGILL: The --

23 THE COURT: Make -- give me the first three sentences
24 of the ruling, so --

25 MR. MCGILL: It'd --

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1 THE COURT: -- I'll hear how I would articulate it
2 because remember, I get my paycheck from the Ninth Circuit.
3 No, I really don't, but they appointed me. But seriously --

4 MR. MCGILL: Yes.

5 THE COURT: If I told you in three sentences,
6 articulate how I have the nerve or the chutzpah, if I could use
7 that term, to ignore what might be a controlling precedent
8 otherwise.

9 MR. MCGILL: I would say it as follows, Your Honor.
10 In Cardelucci, the Ninth Circuit confronted the question of
11 whether the legal rate under 726(a)(5) is the federal judgment
12 rate or the contract rate. That case, however, does not apply,
13 or applies only where 726(a)(5) applies.

14 THE COURT: Well, but it didn't apply to Mr.
15 Cardelucci, and he wasn't in Chapter 7.

16 MR. MCGILL: It abso- -- well, it did apply.

17 THE COURT: Okay. So that's how you would say --

18 MR. MCGILL: Said through the best-interests-of-the-
19 creditor test.

20 THE COURT: That's how you would have me articulate
21 the distinction to come out with a different result. Okay.

22 MR. MCGILL: The distinction is that the Oninks were
23 impaired, and therefore the best-interests-of-the-creditor test
24 applied.

25 THE COURT: Okay.

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1 MR. MCGILL: We are unimpaired, so the best-interests-
2 of-the-creditor test cannot apply.

3 THE COURT: Okay. Got it.

4 MR. MCGILL: Thank you, Your Honor.

5 THE COURT: Thank you very much, Mr. McGill.

6 Okay, Mr. Tsekerides --

7 Oh, wait, Mr. Dunne, do you want to follow him? You
8 were promised five minutes.

9 MR. DUNNE: Five, yeah, yeah.

10 THE COURT: Okay, Mr. Tsekerides, I'm going to let
11 you --

12 MR. TSEKERIDES: If he's going to go, I'll just --

13 THE COURT: No, I'm going to let him close after you,
14 so --

15 MR. TSEKERIDES: Okay.

16 THE COURT: -- go ahead.

17 MR. TSEKERIDES: And Mr. Johnston's going to reserve
18 five minutes.

19 THE COURT: Well, you know what, I'm not going to do
20 that.

21 MR. TSEKERIDES: Well, we had forty-five to start
22 with, so he can't -- he shouldn't be able to cut into our time.

23 THE COURT: I --

24 MR. TSEKERIDES: All right. It's your courtroom.

25 THE COURT: Thanks.

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1 MR. TSEKERIDES: I've never seen so many gyrations to
2 avoid a decision.

3 THE COURT: Well, I'm surprised there aren't more.

4 MR. TSEKERIDES: Let me -- let me read, there was a
5 quote read but they missed the beginning sentence of what
6 Cardelucci said. It said where a debtor in bankruptcy is
7 solvent, an unsecured creditor is entitled to quote payment of
8 interest at the legal rate from the date of filing of the
9 petition, and then it cites 726. So yes, they were trying to
10 figure out what legal rate meant, but first, what they said was
11 where a debtor in bankruptcy is solvent, they're only entitled
12 to payment at the legal rate. That's what it said. The only
13 Ninth Circuit cases to deal with post-petition interest say in
14 a solvency case is federal judgment rate, that, and Shoen which
15 I mentioned earlier in the note.

16 Now, you should go back and read the Pacifica case,
17 and you'll see that it has nothing to with the situation we're
18 dealing with here. That case dealt with reinstatement. We mu-
19 -- if we reinstated, we must pay them the contract rate.
20 That's not this case, it's got nothing to do with this. The
21 only Ninth Circuit decisions relevant here, Cardelucci among
22 them and Shoen, say post-petition interest, federal judgment
23 rate.

24 I'll just deal with a couple other points that were
25 raised. A lot of discussion about impairment, but again, if

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1 the law tells us that they're entitled to only the federal
2 judgment rate and we're paying them what they're entitled to,
3 then they're not impaired by definition, and we would be
4 irresponsible as debtors -- they're saying we should just
5 impair them -- why would we do that? If we're giving them
6 exactly what the law says, it's our obligation, it's our
7 fiduciary duty to apply the law, this is all you get. Why
8 should we impair you to try to take advantage of a situation
9 where the law already says you're not entitled to it? This is
10 what you're getting; that's what we're giving you. So you're
11 not impaired because of Cardelucci.

12 THE COURT: Shoen is a BAP decision --

13 MR. TSEKERIDES: Shoen, Your Honor, is --

14 THE COURT: -- affirmed by the circuit, but --

15 MR. TSEKERIDES: Right, so if I can walk you through?

16 THE COURT: Well, remind me if you would, was the
17 circuit -- the affirmance was just a published affirmance
18 without an analysis though, right?

19 MR. TSEKERIDES: So I have -- so Shoen, it's the Ninth
20 Circuit, and in the decision by the Ninth Circuit, which is at
21 176 F.3d 1150.

22 THE COURT: Yeah.

23 MR. TSEKERIDES: There's a reference where in a
24 footnote, we attached the decision as Appendix A to this
25 opinion, and the decision they're attaching is the one that

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1 they adopted. Then when you got to the Attachment A, and if
2 you don't have it, we can provide this to you.

3 THE COURT: No, no, I -- I have it, I --

4 MR. TSEKERIDES: The court goes through a discussion
5 there. And I will note, it's interesting and kind of curious
6 that the dissenting judge in that case, in Shoen, who didn't
7 think any post-petition interest should be paid was a judge who
8 sat on the panel of Cardelucci, McKeown I believe his name --

9 THE COURT: Is that McKeown?

10 MR. TSEKERIDES: Yeah.

11 THE COURT: Her. Her name.

12 MR. TSEKERIDES: Her name. So she obviously knew how
13 to deal with post-petition interest in a solvent-debtor case.
14 I think at the end of the day, Your Honor --

15 THE COURT: No, but wait a minute.

16 MR. TSEKERIDES: Yeah?

17 THE COURT: Cardelucci came later.

18 MR. TSEKERIDES: Yeah, exactly. She sat on the panel
19 in '99 --

20 THE COURT: Right.

21 MR. TSEKERIDES: -- where it referenced in the
22 underlying decision that a solvent debtor only has to pay post-
23 petition at federal judgment rate. Then she sat on a panel
24 again in Cardelucci, and made the statement even more
25 affirmative is my point.

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1 THE COURT: But I don't remember, because I obviously
2 read Cardelucci and a number of other cases, is that I didn't
3 remember Cardelucci -- I mean, excuse me, Shoen, if it's
4 published, it binds subsequent panels. If it's unpublished, it
5 does not. And because I haven't re-read the case recently, I'm
6 just looking at your table of cases, and the BAP decision
7 appears to have not been published. But if the circuit
8 published its decision, then the question is whether it has any
9 precedential value in terms of binding precedent versus
10 persuasive.

11 MR. TSEKERIDES: And we're not relying on Shoen for
12 the post-petition at federal judgment rate. Obviously, we're
13 relying on Cardelucci, but the other side cited it, and I want
14 to bring to your attention in the BAP panel decision that the
15 Ninth Circuit adopted, the footnote that says in the Ninth
16 Circuit, the federal judgment rate is the rate in a solvent-
17 debtor case. It's only to underscore the point, Your Honor,
18 that Cardelucci didn't go off on a limb, some tangent, they
19 went rogue. They didn't. They held what's always been the law
20 in this circuit when it comes to post-petition interest in a
21 solvent-debtor case; it's the federal judgment rate.

22 THE COURT: Well, but I'm looking at your reply brief,
23 and in your reply brief on page 9, Shoen is only cited in the
24 footnote and the footnote is discussing PPI. And then in the
25 footnote you say -- you mention the creditors citing Shoen.

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1 MR. TSEKERIDES: Right. We didn't run -- we did not
2 rely on it. I think the point I made earlier, we did not rely
3 on that decision, but in reading it again over the weekend, I
4 came across that note in the attachment and I wanted to bring
5 it to the Court's attention.

6 THE COURT: No, I appreciate that, and that's perhaps
7 why I didn't bother reading ab -- reading it, because I didn't
8 think I needed to read it. All right. I'll take them -- I'll
9 take a look.

10 MR. TSEKERIDES: All right. So, again, Your Honor, I
11 think we've beat to death these points. I will invite you to
12 go back and look at that Pacifica case. It doesn't stand for
13 anything relevant to this discussion.

14 THE COURT: Well, it's distinguishable.

15 MR. TSEKERIDES: Well, for a very important reason.

16 THE COURT: Because of what you said, because of the
17 cure.

18 MR. TSEKERIDES: Yeah.

19 THE COURT: What about what Mr. McGill said, do I --
20 do I -- you know, some of us did practice under the Bankruptcy
21 Act, we'll admit to it. And does it -- do we go back to Act
22 cases and say they -- that they carry through and this whole
23 question of --

24 MR. TSEKERIDES: We don't, and we did brief that
25 position, but again I would say, and that might become more of

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1 an issue for the make whole discussion, but here the Ninth
2 Circuit's already said when you have a solvent debtor they will
3 allow post-petition interest, but it's at the federal judgment
4 rate.

5 THE COURT: Yeah, I know, and we've gone through that.
6 We've said that. We've all -- both -- everybody's seen it.

7 MR. TSEKERIDES: Right, so I mean, getting --

8 THE COURT: We know what it says.

9 MR. TSEKERIDES: I mean, so we know -- we would argue
10 and we will argue that the 502(b) means they don't get it. But
11 here, you don't even have to go down that road because you have
12 a decision right on point that says, all right, look, they're
13 solvent, we're going to give them post-petition interest at the
14 federal judgment rate. So we're not arguing that they're not
15 entitled.

16 THE COURT: Well, let's try a different approach.

17 MR. TSEKERIDES: Sure.

18 THE COURT: You know, I got -- a couple weeks ago, I
19 got to speculate on what other courts might decide, so I wasn't
20 bashful about trying that one, so I'll try it here. Would the
21 Ninth Circuit Cardelucci panel or today's version of it apply
22 the same principle to an unimpaired class in a solvent case? I
23 mean, because we know that Onink there was an impaired class,
24 and whether the analysis addresses that it is a relevant fact
25 or not, it's just a fact; it was an impaired class. Here, we

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1 have three, four unimpaired classes.

2 MR. TSEKERIDES: Let --

3 THE COURT: So my speculation, so you tell me how I
4 could be confident that the Ninth Circuit panel today would
5 follow Cardelucci in an impaired class -- excuse me, in an
6 unimpaired-class situation, everything else the same.

7 MR. TSEKERIDES: Sure. I think they would absolutely
8 follow it because their approach was when a debtor in
9 bankruptcy is solvent -- that's what they said, when a debtor
10 in bankruptcy is solvent -- the impairment would come into play
11 if we didn't give them the federal judgment rate like they told
12 us, and if we did not pay on the underlying claim, because this
13 is, remember, interest on the claim. If their underlying claim
14 was not being paid in full, they'd be impaired. They're being
15 paid in full, they're unimpaired.

16 But we're talking about the interest on that claim.
17 Cardelucci doesn't care about, in our view, respectfully,
18 whether it was impaired or unimpaired below, because what they
19 said, and the Shoen footnote as well, but what Cardelucci says
20 where a debtor in bankruptcy is solvent; that's what it said.
21 It didn't say oh, because they're impaired or not impaired.
22 And it makes sense, when the debtor in bankruptcy is solvent,
23 we're going to let them -- we're going to make them pay post-
24 petition interest, so I don't think they get hung up on the
25 underlying claim being impaired or not. And here, they're

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1 putting a rabbit in the hat by claiming they're impaired
2 because we're not giving them the post-petition interest rate
3 they think they're entitled to, but Cardelucci tells us what
4 they're entitled to. So that you can't be impaired because I'm
5 giving you something that the court said I'm supposed to give
6 you, so it's a circular argument on their part. So,
7 absolutely, the Ninth Circuit would follow Cardelucci even in
8 this case.

9 THE COURT: Yeah, I was just looking at the
10 historic -- history and refreshing one question. L & J Anaheim
11 pre-dates Cardelucci by several years, and so L & J set the
12 tone for how easy it is to impair, or how, you know, how
13 delicate non-impairment is and easily changed. And I don't
14 recall, but I don't think solvency and post-petition interest
15 was an issue at all.

16 MR. TSEKERIDES: It wasn't. And also --

17 THE COURT: Yeah.

18 MR. TSEKERIDES: I would point out that L & J dealt
19 with plans, again, plans doing the impairment. The plan is not
20 doing any impairment.

21 THE COURT: Yeah.

22 MR. TSEKERIDES: And that point was made there in that
23 case as well.

24 THE COURT: Okay.

25 MR. TSEKERIDES: Thank you, Your Honor.

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1 THE COURT: And now, Mr. Johnston, you get a couple
2 minutes and then Mr. Dunne, then we're going to be finished.

3 MR. JOHNSTON: Thank you, Your Honor. I've got five
4 quick points. First, an observation. Like you, I've never
5 heard a creditor say before impairment, that's -- that's --

6 THE COURT: Throw me in the briar patch.

7 MR. TSEKERIDES: Yeah. Your Honor, I thought your
8 Section 502(b)(4) hypothetical was frankly brilliant.

9 THE COURT: It wasn't brilliant, I just looked around
10 for something where it was a good example, and the breached
11 leases are not good examples, because by definition you've got
12 impairment, so --

13 MR. JOHNSTON: And I think --

14 THE COURT: Okay it's brilliant. How it carry the day
15 for you?

16 MR. JOHNSTON: I think Mr. Dunne's semi-concession or
17 refusal to answer, depending on how you want to characterize it
18 is really fatal, because it leads to, I think, their argument
19 leads to an absurd result, which is that the unreasonable
20 lawyers' fees in your case would have to be paid if -- by
21 virtue of that creditor being unimpaired. And I submit, Your
22 Honor, of course you could limit those fees through
23 reasonableness. And the --

24 THE COURT: Well, do you think if this guy's in my
25 courtroom now, and I say Mr. Unreasonable Lawyer, your fees are

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1 unreasonable, therefore, I'm reducing them. Would he say okay,
2 now I'm impaired, so I get to submit a vote?

3 MR. JOHNSTON: If he was sitting over there, he would,
4 and the implication of Cardelucci is that he could not.

5 THE COURT: But my question really is more serious.
6 To be faithful to the statute, to be faithful to what the rules
7 are, how could I say to this lawyer, you're unimpaired, but
8 by -- I'm reducing your fees, but you don't even get to vote
9 against -- vote for the plan or against the plan. I mean,
10 you're saying that that's the breaks, you're unimpaired --

11 MR. JOHNSTON: Because --

12 THE COURT: -- your fees are unreasonable, therefore,
13 they must be reduced as a matter of federal bankruptcy law.

14 MR. JOHNSTON: As a matter of the Bankruptcy Code, not
15 the plan at issue. And that is, writ large, the point that the
16 debtors and we are making in this case.

17 THE COURT: What if -- now to take my hypothetical
18 further, what if this avaricious, greedy, unreasonable lawyer
19 is also the plan drafter and proponent, and he puts -- he un-
20 impairs himself?

21 MR. JOHNSTON: I think I dis --

22 THE COURT: And some poor old creditor in the back
23 says, Your Honor, those fees are unreasonable, can I -- can I
24 then throw him and say bad faith or some other thing to do or?

25 MR. JOHNSTON: I suspect that you could, but that's

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1 not the question. You would have an easier route. You would
2 say apply Section 502(b)(4); that's exactly what the Code does
3 to that claim.

4 The emphasis on Pacifica new investments was kind of
5 surprising and odd. If you look at the creditors' opening and
6 reply brief, that case is cited exactly once in each -- in a
7 string cite -- and I know you will, but I urge Your Honor to go
8 back and read that case carefully, because it has nothing to do
9 with this case. But Pacifica involved an over-secured creditor
10 that was being cured and reinstated under 1123(a)(5)(G) and the
11 court then referenced 1124, too. In that case, there was a
12 piece of property that the creditor had a deed of trust on.

13 THE COURT: Right.

14 MR. JOHNSTON: The property was sold during the
15 bankruptcy case for 6.9 million dollars. The deed of trust was
16 2.8 million dollars. Because of the lenders' secured property
17 right in that property, the court held that being cured and
18 reinstated, in order to be unimpaired, you have to protect that
19 property right. That's just not this case where we have an
20 unsecured claim that's --

21 THE COURT: How about protecting your contract right?

22 MR. JOHNSTON: It's not a --

23 THE COURT: It fits right in.

24 MR. JOHNSTON: It's not an interest in property like
25 was the case in Pacifica.

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1 THE COURT: Pink Cadillac.

2 MR. JOHNSTON: They'd like you to make a distinction
3 between pink Cadillacs and black Cadillacs, and there is just
4 no basis for doing that.

5 And so let's go back to, actually, Cardelucci. Mr.
6 Qureshi said that, well, Cardelucci's, you know, policy
7 considerations really only apply in the case where there's a
8 few unsecured creditors seeking post-petition interest; he read
9 that passage. The very next passage says -- rejected the
10 argument that says that a debtor may receive a windfall from
11 the application of a lower federal interest rate to an award of
12 post-petition interest. Nonetheless, interest at the legal
13 rate is a statutory term with a definitive meaning that cannot
14 shift depending on the interest invoked by the specific --

15 THE COURT: Right.

16 MR. JOHNSTON: -- factual circumstances of the case,
17 but --

18 THE COURT: No, that -- that was very loud and clear.

19 MR. JOHNSTON: -- the specific factual circumstances.
20 It doesn't matter how many creditor rates you have. And by the
21 way, there's a lot of creditors in this case, so all of the
22 considerations seem to apply in spades.

23 THE COURT: During PG&E 1, the Cardelucci case came
24 down, and I remember at a hearing there was a discussion about
25 the debtor just got handed several million dollars by the Ninth

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1 Circuit. And that's what it did.

2 MR. JOHNSTON: That's --

3 THE COURT: Okay. Let's go ahead and finish.

4 MR. JOHNSTON: Okay. So with respect to Cardelucci,
5 again, the fundamental point is there is absolutely no mention
6 in that decision as to whether the creditor was impaired or
7 unimpaired, and I think the only reason why you know that the
8 creditor in fact was impaired, because you went back to the
9 record and read the lower court decision. But the court didn't
10 make the rule of decision turn on that fact at all. I go back,
11 in order to distinguish Cardelucci, you really have to conclude
12 what the creditors are telling you to conclude, which is that
13 the Ninth Circuit was either dumb or sloppy. And I submit that
14 you just can't assume that. So that is --

15 THE COURT: I would never assume that.

16 MR. JOHNSTON: Right. I don't think that's a good
17 practice for anyone to do here in the great State of
18 California.

19 THE COURT: Okay. Thank you.

20 MR. JOHNSTON: Unless you have any other questions --

21 THE COURT: I don't.

22 MR. JOHNSTON: -- that's all that I have for you.
23 Thank you.

24 THE COURT: Mr. Dunne, you are in fact the closer
25 under my new rule, until the clock hits 12.

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1 MR. DUNNE: Great, thanks, Your Honor, I appreciate
2 it. But I'm going to bounce around here to just address some
3 things that came up.

4 One is I'm not requesting that you just impair us. I
5 want to take -- I want to be meaningful and thoughtful on this
6 for a second, which is what the debtor's plan seeks to do is to
7 pay in cash the full amount of the allowed claims of the
8 various --

9 THE COURT: Right.

10 MR. DUNNE: -- (indiscernible) classes.

11 THE COURT: Right. Right.

12 MR. DUNNE: This is the kind of obverse of what I was
13 arguing before, but what Congress did in 1994, said there is a
14 way to do that. If you want to -- if you want to both pay them
15 a lump sum of cash and run it through 502, and limit it to the
16 allowed amount of their claim, fine, do that. They're just not
17 unimpaired, meaning they -- they expressly took the category
18 out.

19 Congress' will couldn't have been clearer that you can
20 still do that, plan proponent, pay these creditors a lump sum
21 in cash in the full amount of their allowed claim, but that's
22 no longer unimpairment. That's all I'm saying on that is that
23 you can't -- you can't have it both ways.

24 And I want to talk about Cardelucci for a second. I
25 think, Your Honor, if you ruled in our favor, you start off by

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1 saying I'm bound by Cardelucci, it's good law, and it doesn't
2 address this situation. Why? There are three ways to get
3 post-petition interest, one is under Section 1124, we talked
4 about that.

5 The other is under 1129(a)(7). And what's interesting
6 about Cardelucci is that you had a class, as Your Honor pointed
7 out previously, that voted to accept. So they intentionally
8 went without access to 1129(b) and the fair and equitable.
9 They say I kind of like it. I don't want to get in the way of
10 confirmation.

11 THE COURT: Yeah, but it looks like --

12 MR. DUNNE: And let's reserve --

13 THE COURT: It looks like more of a central -- it
14 looked like the more practical result to get to. Get to a
15 result and to tee up the issue very narrowly. Admittedly
16 narrow one.

17 MR. DUNNE: Right. I mean, reading the Cardelucci
18 case, I don't know why we think it's any broader than it says.
19 They keep saying it's a "narrow but important issue". What is
20 the legal rate under Section 726(a)(5)? That, as we know, is
21 the bare minimum. It's now flipped into the bare maximum. It's
22 the bare minimum. We all know that the best-interests test
23 gets you less than the fair and equitable test in a solvent --
24 solvent estate, and there's no doubt, or there's no evidence
25 that the Ninth Circuit meant to address the fair and equitable

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1 rules coming out of the Supreme Court cases about solvent
2 debtors in Cardelucci because they didn't have to. It was a
3 narrow issue presented to them.

4 The -- so if you want to use Section 1124 to
5 disenfranchise creditors, and you take away 1129(b), which I
6 think is correct, you don't also get then to graft on
7 1129(a)(7) to 1124. That's just -- there's no basis to do
8 that.

9 With respect to Pacifica, I think Your Honor should
10 spend some time with that because the objectors would be right
11 if what the Ninth Circuit said was this, and they didn't, that
12 I think reinstatement is different because Section 1124(2)(a)
13 says you have to cure the default. And that -- those
14 additional words mean you have to pay interest at the default
15 rate. The Ninth Circuit said the opposite in the language I
16 quoted before, that even if you have a cure right, it doesn't
17 matter whether the cure right is less or equal to, the catch-
18 all language, which is identical to our language, required
19 payment at the full contract rate.

20 Your Honor, one last -- one last point, which is in
21 the Ultra II case, this is one of the -- this is not how I get
22 to interest under 1124, but it's how the Fifth Circuit did --
23 is that you have legal, contractual, and equitable rights. And
24 in footnote 2, they said a bankruptcy court's equitable power
25 to enforce the solvent-debtor rule is moored in 11 U.S.C.

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1 Section 1124's command that quote, a plan leave unaltered ...
2 equitable ... rights. So they were focusing on the equitable.
3 And then in the text, they then quote cases that say when a
4 debtor is solvent, it is the role of the bankruptcy court to
5 enforce the creditor's contractual rights under equitable
6 notions of 1129(b). That how the -- that's how Ultra got to
7 1129(b). I wanted to address that because, while I'm not
8 adopting the Fifth Circuit's view, I think it's a more direct
9 read that the text simply says lower case C for claim, you give
10 me everything that is -- I'm due and owing under that claim.

11 And with that Your Honor, I think we should prevail.

12 THE COURT: Okay. I think we should conclude. I'll
13 thank you all for the spirited argument.

14 I will try to make the same commitment that I made in
15 a couple of other cases recently to try to be quick about this.
16 If I -- I realize the importance of the issue, but I also --
17 the only thing that I'm debating apart from everything else is
18 whether some of the other events that we have to deal with in
19 the coming days and the coming weeks, they certainly get
20 extreme attention and priority in whether I want to take a
21 longer time or a shorter time, and I'll just make my own
22 decision on that. So I will thank you all for you time, and
23 wish you a good day.

24 MS. WINTHROP: Your Honor, if I may have thirty
25 seconds of your time?

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1 THE COURT: Thirty seconds of my time?

2 MS. WINTHROP: I'm looking at the clock. Since this
3 is a week of new developments, I want to --

4 THE COURT: You have to state your appearance. I know
5 who you are, but --

6 MS. WINTHROP: Pardon me, Your Honor. Rebecca
7 Winthrop, Norton Rose Fulbright.

8 THE COURT: Yes, I've got your -- I have your
9 stipulation, if that's what you're telling me about.

10 MS. WINTHROP: No.

11 THE COURT: Okay.

12 MS. WINTHROP: I actually have one more development to
13 tell Your Honor on behalf of the Adventist complainants. We've
14 had -- at the end of the last hearing we -- Mr. Feldman, on
15 behalf of the ad hoc subro committee agreed to work with
16 Adventist to work out the issues on the release.

17 THE COURT: On the release.

18 MS. WINTHROP: We've had very productive discussions
19 with them and we have a construct for resolution of our
20 disputes over the release, and we are working with them to
21 implement the mechanism in light of all of the recent
22 developments this week.

23 THE COURT: Okay.

24 MS. WINTHROP: So we wanted to let you know the good
25 news.

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1 THE COURT: Thank you very much, Ms. Winthrop, I
2 appreciate the news.

3 All right. Thank you, everyone. Have a good day.

4 UNIDENTIFIED SPEAKER: Thank you, Your Honor.

5 THE COURT: I'll see many of you at 10 o'clock on next
6 Tuesday.

7 (Whereupon these proceedings were concluded at 12:01 PM)

C E R T I F I C A T I O N

I, Clara Rubin, certify that the foregoing transcript is a true and accurate record of the proceedings.



/s/ CLARA RUBIN

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Date: December 12, 2019

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